IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 19.

THE CRESCENT AMUSEMENT COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

BRIEF ON BEHALF OF THE CRESCENT AMUSEMENT COMPANY, ET AL., APPELLANTS.

GEO. H. ARMISTEAD, JR.
WILLIAM WALLER,
Counsel for Appellants.

ARMISTEAD, WALLER, DAVIS & LANSDEN,
Of Counsel.
Nashville, Tennessee.

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REFERENCE TO OPINIONS BELOW.

No opinion was filed in the Court below with the exception of an opinion on preliminary motions to strike a portion of the complaint and for bills of particulars. The official reference to this opinion is *United States* v. *Crescent Amusement Co., Inc., et al.*, (D. C., M. D., Tenn., Feb. 21, 1940), 31 F. Supp. 730.

GROUNDS OF JURISDICTION.

This was an equity case filed by United States of America involving the Sherman Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C., secs. 1 and 2). The jurisdiction of this Court to review by direct appeal the judgment entered below is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 15 U. S. C. 29), and Section 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C. 345).

The final decree[1] was entered May 17, 1943, and within ten days thereafter motions were filed by appellants (defendants below) to amend the Findings of Fact in substantial and material ways.[2] These motions were in part granted and in part overruled on August 30, 1943[3], and this appeal duly prayed and granted on October 29, 1943, within the sixty-day period.[4]

Consideration of the question of the jurisdiction of this court was postponed to the hearing on the merits.[5] This brief on the merits assumes that the Court will take jurisdiction. The Government has not questioned the jurisdiction of the Court in this case, although appellees in case No. 18 (the second appeal by the Government) pointed out what we regard as a serious jurisdictional question. That is to say, the Government was allowed a premature appeal which was never abandoned or dismissed but was deliberately kept alive by orders entered in the District Court; and the District Court proceeded to take steps in the case, by filing amended findings and conclusions and allowing the Government's second appeal, after it had lost jurisdiction by allowing the first appeal.

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[1] R. 1480
[2] R. 108-139, 1485
[3] R. 1489-1495
[4] R. 1505-1521
[5] R. 1537

STATEMENT OF THE CASE.

I. Proceedings Below.

Plaintiff, United States of America, filed this suit in equity on August 11, 1939, against: (1) The Crescent Amusement Company and four corporations in which it owned half the stock, Lyric Amusement Company, Inc., Cumberland Amusement Company, Strand Enterprises, Inc. and Nu-Strand Corporation; (2) Rockwood Amusements, Inc., and two corporations in which it owned half the stock, Cherokee Amusements, Inc., and Kentucky Amusement Co., Inc.; (3) three individuals who are officers of one or more of the above corporations, Messrs. Sudekum, Stengel and Baulch; (4) Muscle Shoals Theatres, Inc., a partnership composed of Louis Rosenbaum and Mrs. Tony Sudekum; and (5) eight distributors (who for convenience will be referred to by abbreviations of their corporate names) as follows: Paramount, Fox, Warner, Loew's, RKO, United Artists, Columbia and Universal. The defendants other than the distributors were referred to as "defendant exhibitors". (These corporations will be referred to as Crescent, Cumberland, etc., rather than by their full corporate names.)

It was alleged that defendant exhibitors, by combinations with distributors, had obtained control of the film market and had exercised this control so as unreasonably to restrain, suppress or eliminate the competition of "independent exhibitors".[1] (It should be pointed out that defendant exhibitors themselves were and are independent of affiliation with any distributor.)

Plaintiff voluntarily dismissed the case prior to the trial as to Paramount, Fox, Warner, Loew's and RKO and eliminated all allegations that any of the distributors had combined among themselves.[2] There were left in the case the allegations as to combinations among the defendant ex-

[1] R. 7

[2] R. 19

hibitors and between defendant exhibitors and individual distributors. The occasion for the dismissal of the case as to the five distributors was a consent decree entered in a case brought against the distributors in the United States District Court for the Southern District of New York, referred to in the record as the Paramount case. These five distributors owned in whole or in part various chains of theatres and the Government sought to divorce the operation of theatres from the distribution of motion pictures. By the consent decree these distributors were permitted to retain their theatres but there was put into effect something in the nature of a Code of Fair Practices.[3] United Artists, Columbia and Universal owned no theatres and were not parties to the consent decree. These last three distributors are pleased to refer to themselves as the "Little Three", and the others as the "Big Five", and for convenience these designations will sometimes be used in this brief.

Prior to the trial the District Court entered an order, on motion of defendant exhibitors, requiring plaintiff to furnish a bill of particulars and to specify the independent exhibitors whose competition had been restrained, suppressed or eliminated and the particular manner or manners in which the competition of each of them was restrained, suppressed or eliminated.[4] By a subsequent order, plaintiff was permitted to file additional bills of particulars and give additional information in these respects as and when plaintiff obtained knowledge thereof, but in no event later than thirty days preceding the trial.[5] This order was never modified and hence the issues in this respect were confined to the particulars furnished by plaintiff in accordance with these orders. Plaintiff included in its bills of particulars at least one situation alleged to have occurred after the filing of the complaint;[6] and after the

[3] R. 198-227
[4] R. 151
[5] R. 159
[6] Dixie Theatre, Gadsden, Ala.; R. 171

trial had proceeded for about two weeks, plaintiff filed a supplement to the complaint in which it was alleged that the unlawful acts complained of had continued down to the time of the filing of said supplement.[7]

The District Court filed no opinion but filed "Findings and Conclusions" in which it was held that Columbia and Universal were not guilty of any violation of the Sherman Act; that Strand Enterprises, Inc., and Nu-Strand Corporation were not guilty of any violation of the Sherman Act; and that Baulch was not guilty of any violation of the Sherman Act. It was held, however, that the proof established violations by the remaining defendant exhibitors and by United Artists. The gravamen of the decision was that in a few isolated instances an individual distributor had "discriminated" against an independent exhibitor in the licensing of pictures; e. g. that the particular distributor had licensed the first run of its product in a particular town to Crescent, instead of to Crescent's competitor, without giving the latter an opportunity to bid. The Court did not find that the defendant exhibitors had "conspired" with any distributor to discriminate against the independent, but held that the defendant exhibitors enjoyed "circuit buying power" which induced the distributors to "discriminate." The Court concluded that there were illegal combinations between the particular defendant exhibitor and the particular distributor involved in these different situations.

There was no finding that any independent exhibitor's competition had been unreasonably restrained, suppressed or eliminated as averred in the complaint and as set forth in the bills of particulars.[8] Nor was there any finding that the interests of the theatre-going public had been adversely affected. There was no evidence (and no contention by the Government) that the defendant exhibitors charged excessive admission prices or failed to provide good theatres and

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[7] R. 20.

[8] R. 1352-1479

good service, or failed to exhibit the best pictures which were produced by each distributor. The decree was predicated on the theory that there should be competition between exhibitors in any town large enough to support two theatres, and that the Sherman Act was violated *by defendant exhibitors* if the independent exhibitors were not given the opportunity *by each distributor* to bid for the latter's product. In other words, the question which concerned the Anti-Trust Division was not whether the theatre-going public in a small town in Tennessee was allowed to see "Gone With the Wind" for a reasonable admission price, but whether that picture was exhibited by Crescent or by Crescent's competitor.

It would appear that, in the application of the Government's theory, an injunction should have been sought against the distributors to prevent them from licensing pictures in competitive situations without giving each of the competing exhibitors an opportunity to negotiate for the pictures. This was the relief prayed in the complaint as filed. Later on, however, the Government dismissed as defendants the five principal distributors, and without amending the prayer of the complaint obtained an injunction against the defendant exhibitors which not merely placed the burden upon the latter to see that the distributors follow non-discriminatory licensing methods, but severely punished the defendant exhibitors for violating the Sherman Act.

For the convenience of the Court the final decree of May 17, 1943,[2] is copied in full in an appendix to this brief.

Appellants are the defendant exhibitors found guilty, with the exception of Muscle Shoals Theatres who did not appeal. Appellants have been assigned error as to paragraphs (1), (8), (12), (13), (15), (16), (18) and (21) of said decree. As to the remainder of the decree, appellants have not assigned error for the reason that they regard it as harmless error and prefer to present to this Court the

[2] R. 1480-1484

portions of the decree which materially and vitally affect them.

II. Nature of the Business.

We believe it appropriate to give a preliminary outline of certain axiomatic facts and principles involved in the business of licensing and exhibiting motion pictures.[1] Inasmuch as the alleged violations of the Sherman Act relate to the operation of theatres in small towns in Tennessee and adjoining states, this outline will refer in particular to the licensing practices in vogue in such small towns, rather than in large cities. It will also refer to the licensing practices in vogue during the period covered by this suit rather than the practices put into effect by the consent decree in the Paramount case.

1. A motion picture film is a copyrighted article which has no standard market price, and film rentals are fixed by "horse trading." The exhibitor hopes to get a deal in which he is required to play and pay for a minimum number of pictures out of the season's product so that he can select the best box-office attractions and reject the others. The exhibitor also hopes to get a contract which will permit him to play the pictures soon after release date and to pay as low film rentals as possible. Frequently, however, he prefers to negotiate a late film deal because he can then, generally speaking, procure the pictures for lower film rentals. Generally speaking, the same picture will procure for the distributor a high or low film rental depending upon whether it is played soon or late after release date and depending upon whether it is played first run or second run

[1] See discussions in *Westway Theatre* v. *Twentieth Century Fox Film Corp.* (D.Md.1940) 30 F. Supp. 830; aff'd (C.C.A. 4, 1940), 113 F. (2d) 932; *Gary Theatre Co.* v. *Columbia Pictures Corp.* (C.C.A. 7, 1941), 120 F. (2d) 891; *Midwest Theatres Co.* v. *Cooperative Theatres* (D.C.E.D.Mich.1941), 43 F. Supp. 216, 222; *William Goldman Theatres, Inc.* v. *Loew's, Inc. et al* (D.C.E.D. Pa.1944) 54 F. Supp. 1011. The consent decree in the Paramount case, to which reference will be made, is copied at pages 198-227 of the record.

in the town, and as to whether or not clearance is given over neighboring towns.[2]

2. In addition to the eight distributors referred to as co-conspirators in the case, there were other so-called independent distributors who distributed motion pictures. So far as was concerned the number of pictures produced over any particular period of time, there were always more than enough pictures available for exhibition both by the defendant exhibitors and by their competitors.[3] Necessarily, each distributor had some pictures which were better than others from the standpoint of box-office attraction. There is no definite standard for determining whether one picture is more choice or less choice than another, and box-office appeal of different types of pictures varies in different sections of the country and in different localities in the same section of the country. In the section of the country where defendant exhibitors do business, the so-called "Western" pictures are particularly choice pictures,[4] although in some other sections of the country this type of picture is rarely shown. These Western pictures are distributed, in the main, by companies other than the eight distributors named as co-conspirators. No one distributor's entire product consists of "choice pictures," but each distributor produces some choice pictures and some less desirable pictures.

3. It is the general aim and purpose of the distributor to obtain the maximum revenue for its pictures over a period of years in any given territory. It may be to the interest of a distributor to refuse, for a period of one or more years, to make any deal at all with an exhibitor on terms which are unsatisfactory,—one reason being that the starting point of negotiations for a film deal is generally the deal for the prior season, so that a distributor would prefer to start such negotiations without any precedent at all, rather

[2] See R. 899-902, 1208-1209, as to film negotiations from the viewpoint of the exhibitor.

[3] R. 231, 233, 1204

[4] R. 908, 1198-1201, 1350-1351. See also Amending Finding 113, R. 1492-1493.

than with a poor precedent from its standpoint, even if the result is to lose revenue for the particular season.[5] Similarly, it may be to the interest of an exhibitor to leave out the pictures of one or more distributors during a particular season where the terms offered by the distributor are unsatisfactory to the exhibitor. Where a distributor's product is left out for one season, the exhibitor is frequently able to make a deal the next season which will cover both seasons' products and permit the exhibitor to select a given number of pictures from the two seasons' products rather than from any one season's product.[6] Since competition among exhibitors generally enables a distributor to be assured of licensing its pictures in the town, and to obtain higher film rentals and dispose of its inferior pictures as well as its good ones, it is to the decided financial advantage of the distributor to have competition among exhibitors, provided the competition is of a substantial character.[7]

4. In negotiations for film deals, the staying power of each party to the deal is necessarily an important factor. The distributors have far greater resources, and hence greater staying power, than exhibitors who are not actually affiliated with a distributor. Similarly, where there is competition among the exhibitors in a particular town, the exhibitor with the greater resources necessarily has the greater staying power, whether those resources consist of theatres in other towns or money in the bank.

5. Prior to the consent decree in the Paramount case, it was a general policy of most of the distributors not to license a second run of its product in a small town to a competitor of the first run exhibitor. This policy was based on the well-known fact that theatre-goers will wait to see a second run of a picture if it is known with reasonable

[5] R. 1024-1025. Another reason is that, with product open in the town, there is the possibility that a competing theatre will open and give the distributor another potential outlet for its product.

[6] R. 901-902

[7] R. 1114-1115, 1324

certainty that the picture will be shown again at a lower admission price. Where the second run exhibitor is a competitor of the first run exhibitor, he will be sure to let the public know that the pictures are coming back, and the first run revenue from the pictures will thus be impaired. Film rentals must ultimately depend upon the gross receipts obtained by the exhibitors. The first run revenue from a picture in a small town is, generally speaking, so much greater than the second run revenue that it is against the interest of a distributor to jeopardize the first run revenue by competing with itself. Of course, these principles are not applicable to the same extent in a situation where the two theatres are owned by the same exhibitor, because such an exhibitor will try in his own interest to follow a policy which will protect the first run revenue.[8]

6. Where a distributor is negotiating with an exhibitor who has several theatres, the distributor's aim is to license the pictures for all of the theatres and not merely for the one or more theatres located in towns where there is competition. It would naturally be to the exhibitor's advantage to license the pictures in the towns where there is competition before negotiating for a deal in the towns where there is no competition. But the distributor has the advantage of "leverage" under these circumstances, and can refuse to make any deal other than a circuit deal.[9] Conversely, the exhibitor need not agree on terms for the non-competitive situations unless and until the distributor has agreed on terms for the competitive situations.[10]

7. Competition between exhibitors in a particular town not only enables the distributor to play one exhibitor off against the other, and obtain higher film rentals, but such competition also tends to reduce the income of the competing exhibitors because patronage is divided. The mere

[8] R. 1015, 1326
[9] R. 752, 828-829, 856-857
[10] R. 264

fact that one exhibitor plays pictures ahead of the other exhibitor does not mean that the latter cannot survive. A theatre which plays pictures late in the season, with low admission prices and low film rentals, may have a better margin of profit than a theatre which plays pictures early but with high admission prices and high film rentals. Similarly as to the class of pictures played: a theatre which plays action pictures and Western pictures in a small Tennessee town may make more money than a theatre which pays high film rentals in order to play pictures which the film critics approve.[11] In a small town, competition will naturally enter if the existing theatre is inadequate or furnishes inadequate entertainment. Otherwise competition will not normally enter except for the purpose of creating and cashing in on a nuisance value.

8. A motion picture exhibitor must have pictures to show in his theatre every business day in the year. He is dependent upon the regular flow of a product over which he has no control except by bargaining with the distributors. In a rising market such as the country experienced during the period covered by this suit, the demands of the distributors were constantly increasing as to film rentals and terms. The gross receipts of a theatre must be divided between distributor and exhibitor. The distributors have each year sought an increase in their part of each dollar of gross receipts. These increasing demands naturally led to disputes with exhibitors and these disputes led to delays in the licensing of pictures. In the bargaining between distributors and exhibitors, efforts were made by both parties to arrive at methods which would furnish the exhibitor the regular flow of product which he desired, and at the same time furnish the distributor the constantly increasing revenue demanded by it. Out of this situation the so-called "franchise" was developed,—a film deal covering a period of years as contrasted with the usual film deal which

[11] R. 908, 1198

covered the product of only one season. Quite naturally the distributors were inclined to execute these franchise agreements only with exhibitors who had a record of financial stability.

III. Theory of the Decision.

The theory of the decree (except the portion of the decree relating to "franchises") is apparent from Findings 52[1] and 75[2] and Conclusion 17[3] relating to United Artists Corporation, the only defendant distributor found guilty of violating the Sherman Act. Conclusion 17 is in *pari materia* with Conclusion 13[4] relating also to the five distributors who were voluntarily dismissed as defendants.

In Finding 52 the Court found that in Rogersville, Tennessee, where an independent exhibitor named Miller was doing business, United Artists preferred to deal with Cumberland Amusement Company so that it could make a deal with Cumberland in the ten other towns in which that circuit operated.

In Finding 75 the Court found that in Athens, Alabama, an independent exhibitor named Buchanan applied for United Artists products but that United Artists licensed the product to Muscle Shoals Theatres (Rosenbaum). The Court found that United Artists Corporation preferred to deal with Muscle Shoals Theatres because it could get more revenue by selling Muscle Shoals Theatres for its four towns than by selling Buchanan for Athens alone.

In Conclusion 17 the Court held that United Artists Corporation had violated the Sherman Act by making deals with Muscle Shoals Theatres and Cumberland Amusement Company instead of with Buchanan and Miller. In explaining this conclusion, the Court said:

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[1] R. 1383-1386
[2] R. 1399-1401
[3] R. 1477-1478
[4] R. 1477

"This phase of the case has caused the Court more concern than any other question involved. The Court recognizes the rule that a distributor of motion picture film is perfectly free to do business with the exhibitor of its choice, and to negotiate with a circuit and an independent one at one and the same time, and to sell either one it prefers to do business with, yet such conduct must be free from discrimination against independent enterprises as a result of pressure or coercion on the part of a monopoly or combination.

"There is no evidence that United Artists entered into a conspiracy with either Crescent, Rockwood, Cumberland, Sudekum, Stengel or Rosenbaum, in any of these matters, yet to hold there was no discrimination in either of the above instances, would be ignoring the plain facts. Under all the circumstances, United Artists could hardly be blamed for preferring to do business with the circuit and its affiliates, but it should not have allowed such desire to influence its conduct to the extent it apparently did, in its dealings with Miller and Buchanan. The principal criticism for this situation, however, lies at the doorstep of the monopoly built up by Crescent and its affiliates, and United Artists hardly did more than cooperate with what it knew to be the policy of the monopoly in order to make an attractive business deal."

Paramount, Fox, Warner, Loew's and RKO were voluntarily dismissed as defendants before the trial of the case, and for that reason there was no Conclusion that any of these distributors had violated the Sherman Act. However, in Conclusion 13, the Court held that the defendant exhibitors violated the Sherman Act by combining with these distributors as well as with United Artists "in licensing films for the purpose and with the effect of maintaining theatre monopolies and preventing independent theatres from competing with them". If Conclusion 13 be examined in conjunction with Conclusion 17, it is apparent that the Court held, in effect, that none of the defendant exhibitors had "conspired" with any of the distributors but had "combined" with each of the distributors in licensing films.

Following this theory, the Court entered a decree in which it was provided: "That each exhibitor defendant be, and hereby is, enjoined and restrained from conditioning the licensing of films in any competitive situation outside Nashville, Tennessee, upon the licensing of films in any other theatre situation."[5] United Artists Corporation, the only defendant distributor found guilty, was not enjoined from conditioning the licensing of films in competitive situations upon the licensing of films in other situations; and, of course, none of the other distributors were enjoined because Columbia and Universal were held not guilty, and the Big Five had been voluntarily dismissed as defendants.

As we understand it, the Government construes this provision of the decree as imposing upon defendant exhibitors the burden of ascertaining, before licensing films in any competitive situation, that the distributor has given the competing exhibitor the opportunity of bidding for these films. Not only is this confusing standard of *future conduct* laid down for the exhibitors by the decree, but their failure to observe this standard of conduct in the *past* is made a predicate for the most drastic character of punitive relief. While ignorance of the law is no excuse, the District Court has not regarded as even a moderating circumstance the fact that these defendants did not anticipate the novel theory of the Sherman Act which has been adopted. The decree of the Court goes on to provide that, because of these violations of the Sherman Act, Crescent must divest itself of stock ownership in Cumberland and Lyric; that Rockwood must divest itself of stock ownership in Cherokee, Ruffin and Kentucky; that Cherokee must divest itself of stock ownership in Newport, and that neither Sudekum nor Stengel can be an officer of more than one corporation.[6]

[5] R. 1482-1483.
[6] R. 1483

The attention of this Court is invited to the sweeping character of the charges in the complaint and bills of particulars as compared with the violations of the Sherman Act which were actually found by the District Court to have occurred. The Conclusions of the District Court are based on Findings of a relatively few "discriminations" by distributors against competitors of defendant exhibitors. It is to be assumed that the District Court had in mind "unreasonable discriminations" because the very nature of the business is such that to license a particular run to one exhibitor is to discriminate against his competitor. It is difficult, however, to gather from the Findings the feature or features which made the discriminations unreasonable. The distributors had valid business reasons, in each instance, for preferring to make these film deals with appellants rather than with the independents. The District Court in Findings 111 and 112[7] expressly recognized this fact but seemingly regarded it as immaterial to the decision.

Each discrimination involved one distributor and one season's product. The District Court refused to find there had been *any* conspiracy—much less that these discriminations were the "symptoms or incidents of an enveloping conspiracy with its own illegal ends" (297 U. S. 515). The drastic "relief" granted the Government, particularly in the divestiture provisions of the decree, is out of all proportion to the minor violations of law which were found to have been committed. No period of probation was given the defendant exhibitors such as is frequently given an ordinary criminal on his first conviction.

The findings as to discrimination by distributors against independent exhibitors are based almost entirely upon letters and memoranda, written by employees of the distributors to each other, which appellants knew nothing about until the trial, or shortly prior thereto. These findings are adopted almost *verbatim* from a printed brief

[7] R. 1428-1429; *infra* pp. 51-52.

filed by plaintiff after the conclusion of the evidence in the case.[8]

In the complaint, plaintiff did not contend that mere discrimination by one or more distributors against an independent exhibitor was *per se* a violation of the Sherman Act. The decision of the District Court as to the legal effect of these isolated instances of alleged discrimination thus goes beyond the theory of the complaint.

An examination of the bills of particulars[9] disclosed that plaintiff proposed to prove that the competition of specified independent exhibitors was unreasonably restrained, suppressed or eliminated because they were unable to obtain sufficient product. Plaintiff alleged in the complaint (paragraphs 40-42)[10] that an exhibitor should have the product of three of the eight distributors each season in order to operate successfully. There was no finding to the effect that any of these independent exhibitors were ever unable to obtain the product of three of the eight distributors in any season, and the evidence did not support any of the charges as to restraint, suppression or elimination of competition as the result of a shortage of product.

The District Court based the decree upon the theory that if particular distributors discriminated against particular independent exhibitors, the operators of the circuits were guilty even if the independent exhibitors had available to them a sufficient number of choice pictures of other distributors. The effect of the discriminations on the business of the independents was an essential element of the complaint but was seemingly regarded as immaterial by the District Court.

In paragraph (10)[11] of the decree the Court declared invalid certain franchises to which certain of the appellants were parties. Cumberland Amusement Company was

[8] Stipulation, R. 1521-1522
[9] R. 153-173
[10] R. 7
[11] R. 1482

included in paragraph (10), although the proof was undisputed that Cumberland Amusement Company was not a party to any of these franchises. There was no allegation in the complaint to support this provision of the decree. No reason was given by the Court for declaring these franchises invalid. Since all of these franchises have now expired, no error is assigned to this action of the Court.

However, in paragraph (1) of the decree,[12] appellants are enjoined and restrained "from continuing in combination with each other and with each of the distributors, Paramount, Fox, and Warner in making franchises with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them". Again, there was no allegation in the complaint to support this provision of the decree.

Much of the evidence as to franchises related to Clause 8-e of the Paramount franchise[13] whereby appellants were given the right to "repeat" pictures at specified film rentals. Plaintiff contended that Clause 8-e had the effect of tying up second-run product so that independents were precluded from licensing it even though appellants had not contracted for it. Appellants vigorously disputed this contention. The District Court's Findings are in accord with plaintiff's contention,[14] but appellants insist that they are not supported by competent evidence. The decree, however, is to the effect that the Paramount franchise was invalid *in toto*,—not merely Clause 8-e,—and that the Fox and Warner franchises were also invalid *in toto* although the repeat run clauses were quite different. Comments of the Court during the argument as to the form of the decree indicated that the Court did not intend to hold a two-year franchise illegal, but only franchises for longer periods than two years.[15] The decree, however, contains no such qualifying language.

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[12] R. 1480

[13] Exhibits P-24, P-29 and P-30, sent up in original form.

[14] R. 1432, 1435-1438

[15] R. 52

SPECIFICATION OF ERRORS.

The errors assigned by appellants are twenty-six in number and cover fourteen pages of the record.[1] Appellants intend to urge all of these errors, and they are discussed in the sequence set forth in the following summary. This summary follows the "statement of points on which appellants intend to rely" which was filed in connection with the appeal.[2]

SUMMARY OF ARGUMENT.

1. Plaintiff contended in the District Court that defendant exhibitors (appellants here) exercised "control" over the licensing of films by the eight major distributors, Paramount, Fox, Warner, Loew's RKO, United Artists, Columbia and Universal, and that by the exercise of said control defendant exhibitors were able to and did unreasonably restrain, suppress and eliminate the competition of competitors referred to as independent exhibitors. The District Court did not find or conclude that plaintiff's contentions in these respects were supported by the evidence. Appellants here contend that there was a fatal variance between the allegations and the Findings (as well as the proof) and that the decree cannot stand for that reason.

2. The District Court found that in several instances a distributor discriminated against an independent exhibitor in the licensing of films. It was found, in effect, that in making deals with a defendant exhibitor rather than with an independent, the distributor was influenced by its desire for the business of the defendant exhibitor in other towns in the circuit. The District Court concluded that the discrimination was the result of "coercion" exercised by defendant exhibitors. It is the contention of appellants that such discrimination by the distributors would not warrant the conclusion that defendant exhibitors violated

[1] R. 1506-1520

[2] R. 1533-1535

the Sherman Act and would not justify paragraphs (8), (12), (13), (15), (16), (18) and (21) of the decree, even if the complaint had been filed on that theory.

3. It is the contention of appellants that the findings of discrimination should be disregarded in this Court as entitled to no weight whatever for these additional reasons: (1) because they are based almost entirely on incompetent evidence consisting of inter-office memoranda and communications from one employee of a distributor to another employee of the same distributor, and appellants had nothing to do with said communications and were not parties to them; (2) because the Findings are copied from plaintiff's brief and hence are entitled to no greater weight than their source, which was an admittedly partisan document.

4. It is the contention of appellants that the findings of discrimination are contrary to the weight of the competent evidence in the record, and that in these cases of alleged discrimination, the distributor in every instance had a good and valid reason for preferring to do business with the defendant exhibitor rather than the independent, wholly aside from the desire of the distributor to get additional revenue by making a circuit deal.

5. All other questions aside, appellants contend that paragraphs (8) and (12) of the decree are not adapted to carrying out the purposes of the Sherman Act and should be eliminated from the decree. The effect of these paragraphs is to permit distributors to exercise "leverage" on appellants in negotiating film deals, in that distributors are left free to condition the licensing of films in competitive situations upon the agreement of appellants to license pictures in other situations at film rentals and on terms dictated by the distributors. Appellants are deprived of the right to insist that film rentals and terms for competitive situations be agreed upon at the same time that film rentals and terms for other situations are agreed upon. The

effect is to aggrandize the distributors at the expense of appellants. In this connection it should be stated that plaintiff evidently had the same view of the matter when the complaint was filed. There was a prayer asking for an injunction against the *distributors* but not against the exhibitor defendants. After five of the distributors had been dismissed as defendants, and without any amendment of the prayer, plaintiff at the conclusion of the trial asked for the injunction against the exhibitor defendants which is now found in the decree.

6. All other questions aside, appellants contend that paragraphs (13), (15), (16), (18) and (21) of the decree are harsh and punitive rather than equitable and remedial, and should be eliminated. By these paragraphs of the decree each corporate appellant is required to divest itself of any stock ownership in any other appellant corporation, and also in certain corporations which were not parties to the cause; and Sudekum and Stengel are each permitted to be connected with only one appellant corporation. It is the contention of appellants that these divestiture provisions of the decree have no tendency whatever to correct any of the evils or supposed evils alleged to exist in the business of exhibiting motion pictures, and would entail a substantial financial sacrifice without corresponding benefit to the public.

7. The District Court held that so-called "franchise" agreements between certain of defendant exhibitors and certain distributors (who were indispensable parties to a suit to invalidate such agreements but were voluntarily dismissed from the case by plaintiff) were illegal and void. In paragraph (1) of the decree, the District Court enjoined appellants from entering into further franchise agreements with said distributors "with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them". Appellants contend that franchises are not illegal *per se*;

that it is not a violation of the Sherman Act to have franchise agreements with three distributors at the same time (there being the eight major distributors as well as other so-called independent distributors whose product is available to the independent exhibitors); and that the language of paragraph (4) of the decree does not afford an ascertainable standard of conduct. Appellants further contend that there was no allegation in the complaint to the effect that a franchise was in any different category from a one-year deal, and that the decree in this respect is outside the issues in the case and is *coram non judice* and void. Appellants finally contend that the Findings on which paragraph (1) of the decree is based are not supported by competent evidence and are not entitled to consideration because they were copied from plaintiff's brief; and assignments of error based on certain of these Findings are discussed to illustrate and support that contention.

ARGUMENT.

I. Failure of Plaintiff to Prove the Allegations of the Complaint as Amplified by the Bills of Particulars.

Although this was a suit in equity, the ultimate issue involved was whether defendant exhibitors had violated a criminal statute. One criterion for a fair trial under our system of jurisprudence is that the defendants be given timely notice of the charges and that no conviction (or its equivalent) be predicated on charges at variance with the charges on which they are given such notice.

In *Morgan* v. *United States* (1937) 304 U. S. 1, this Court nullified an administrative decision in a case where no specific complaint had been formulated. Certainly it is worse, after giving defendants notice of specific charges in a complaint and bills of particulars, for the Government in an actual court proceeding to disregard the charges, introduce "thousands of pages of testimony" and "numerous complicated exhibits" (304 U. S. 19) and then obtain a de-

cision on a new theory formulated after it became apparent that the charges contained in the complaint and bills of particulars could not be proven.

The charges on which defendants went to trial in this case were *narrow and specific*. By paragraphs 40, 41 and 42 of the complaint,[1] plaintiff told defendants that independent exhibitors, in order successfully to operate their theatres, must be able to exhibit each year a substantial number of the feature pictures released by three or more of the eight distributors. In paragraph 43[2] it was alleged that defendant exhibitors, by virtue of the control exercised by them over the licensing of feature pictures, had been able to take over the operation of numerous theatres and keep other theatres closed. In paragraph 49[3] it was alleged that certain "exclusive privileges" specified in paragraphs 47 and 48, had enabled the defendant exhibitors unreasonably to restrain, suppress and eliminate the competition offered by other theatre operators. These allegations were repeated in paragraph 54. Other allegations of paragraph 54 were eliminated from the case by action of the court on defendants' motion to strike.[4]

On motion of defendant exhibitors plaintiff was required to specify the theatres referred to in paragraph 43 and as to each threatre, "the manner in which control over the licensing of feature pictures was exercised by the defendant exhibitors to enable them to take over the theatre or keep the theatre closed." Plaintiff was further required, in respect of paragraph 49, to specify the theatre operators whose competition was restrained, suppressed or eliminated "and the particular manner or manners in which the competition in each of them was restrained, suppressed or eliminated, and the time when each restraint, suppression or elimination was

[1] R. 7
[2] R. 7
[3] R. 8-9
[4] R. 9-10

effected".[5] In response to the order of the Court, plaintiff specified the theatre operators and gave these particulars as to the situations where it was contended that competition had been restrained, suppressed or eliminated, as the result of any of the four types of practices enumerated in paragraph 49.

Paragraph 49 of the complaint was as follows:[6]

> "49. The foregoing exclusive privileges have enabled the defendant exhibitors unreasonably to restrain, suppress, and eliminate the competition offered by other theatre operators in said Crescent towns by—
>
> (a) Preventing them from obtaining enough first-class pictures for exhibition to operate their theatres successfully.
>
> (b) Forcing them to exhibit feature pictures previously exhibited or rejected by the defendant exhibitors and to maintain admission prices for such pictures higher than those warranted by the quality of the entertainment they were thus able to offer.
>
> (c) Preventing them from showing any feature pictures released by the defendant distributors with first-run clearance in any of said towns.
>
> (d) Preventing them from exhibiting any feature pictures released by the defendant distributors with second-run clearance in any of said towns where any of the defendant exhibitors operate one or more second-run theatres."

[5] Particulars as to theatres "taken over" or "kept closed" were furnished in paragraph 1, and particulars as to other theatre operators whose competition was restrained, etc., were furnished in paragraph 6 of the successive bills of particulars which were filed. R. 153-173. Paragraphs 1 and 6 of the bills of particulars correspond with items 1 and 6 of Section III of defendant's motion, R. 142, 144, and of the court's order, R. 152.

[6] R. 8-9

In the bills of particulars[7] plaintiff abandoned (b), (c), and (d) and relied only upon: "(a) Preventing them from obtaining enough first-class pictures for exhibition to operate their theatres successfully". When the bills of particulars were filed, there were variations in this particular language, but sub-paragraph (a) of paragraph 49 was evidently intended. The situations thus specified and the particulars given included the following:

CRESCENT AMUSEMENT COMPANY

Time: (R. 172) 1935 and 1936
Place: Brownsville, Tennessee.
Theatre: Southland
Independent Exhibitor: C. G. Lawing
Distress Methods Employed: Kept independent from obtaining sufficient product to continue in business and independent was forced to close.

Time: (R. 160-161) June, 1936.
Place: Greenville, Tennessee
Theatre: Princess
Independent Exhibitors: Ausmus and Parrott Amusement Company, Inc., and Parrott and Hendren Amusement Co., Inc.
Distress Methods and Manner Employed: Threat of opening competing theatres in town and running independent exhibitors out of business. Independent exhibitors had trouble getting pictures and were forced to sell.

Time: (R. 155) August 1939
Place: Earlington, Kentucky
Theatre: Roxy
Independent Exhibitor: E. W. Dozier
Distress Methods and Manner Employed: Defendant exhibitor opened a second competing theatre and began to cut prices. Independent exhibitor had trouble procuring pictures and was forced to sell.

Time: (R. 155) December 1938
Place: Hopkinsville, Kentucky
Theatre: Kentucky
Independent Exhibitor: V. R. Anderson
Distress Methods and Manner Employed: Defendant exhibitor engaged in price cutting, had bank nights and family nights, stage shows and the like. Independent exhibitor had trouble getting pictures and was forced to sell.

[7] R. 153-173

Time: (R. 154-155) June 1939
Place: Union City, Tennessee
Theatre: Roxy
Independent Exhibitor: John. D. Henry
Distress Methods and Manner Employed: Defendant exhibitor opened a second competing theatre and began to cut prices. Independent exhibitor had trouble procuring pictures and was forced to sell.

Peerless Enterprises, Inc. (No time specified). Theatres at Morristown, Tennessee and Harriman, Tennessee. Was unable to get sufficient product to operate successfully and was forced to close down. (R. 158)

Dixie Theatre, H. T. Bailey, Jr., Manager, Gadsden, Alabama. (No time specified). Independent exhibitor unable to obtain satisfactory product and is having difficult time continuing in business. (R. 171)

ROCKWOOD AMUSEMENTS, INC.
Time: (R. 155) December 1937
Place: Central City, Kentucky
Theatre: Empress
Independent Exhibitor: F. M. Pittman
Distress Methods and Manner Employed: Defendant Exhibitor opened competing theatre. Independent exhibitor was unable to compete with the purchasing and booking power of defendant exhibitor chain.

CUMBERLAND AMUSEMENT COMPANY AND ROCKWOOD AMUSEMENTS, INC.
Time: (R. 154) September 1938
Place: Rogersville, Tennessee
Theatre: Palace
Independent Exhibitor: William P. Miller
Distress Methods and Manner Employed: Defendant exhibitor built a new theatre, cut prices and began to show double features. Independent exhibitor had difficulty getting desirable pictures and was forced to sell.

CHEROKEE AMUSEMENTS, INC. None
KENTUCKY AMUSEMENT CO., INC. None
LYRIC AMUSEMENT CO., INC. None

It will be noted that the particulars as to the situations above tabulated were all furnished under paragraph 1 of the respective bills of particulars, except the particulars as

to Peerless Enterprises, Inc. and the Dixie Theatre, Gadsden, Alabama, which were furnished under paragraph 6.

In the foregoing tabulation we have, of course, omitted situations which were included in the bills of particulars but as to which plaintiff abandoned its contentions or there were no Findings. We have also omitted situations where the only particulars furnished were along the lines of that part of paragraph 54 of the complaint which was stricken by the Court on motion of defendants.[8] These allegations as to lowering of admission prices, giving away prizes, etc., were eliminated from the case by order of the Court, and there was no subsequent order for their reinstatement.

It should also be noted that the Findings of the Court include references to a number of other situations which are not included in the foregoing tabulation. Some of these situations were not properly in the case for the reason that no particulars were furnished, and for the further reason that the independent exhibitors were still in business at the time of the trial. There was no allegation as to unsuccessful "threats" but only as to successful "threats"; and there was no Finding as to any restraint, suppression or elimination of their competition. There are also Findings relating to situations where the only particulars furnished were as to "implied threats" that the independent exhibitor would be prevented from procuring desirable pictures, and sold his theatre on account of these implied threats. This allegation was made in paragraph 54 of the complaint. The implied threat consisted merely of the opening or professed intention of a defendant exhibitor to open a competing theatre, and the independent offered to sell his theatre because he preferred to sell out rather than have competition. There are also Findings which are not properly in the case because the circuit involved in the situation was not a defendant in the case but was merely affiliated with a defendant exhibitor.

[8] R. 152.

In order that the Court may readily see that we have included in the foregoing tabulations all situations which are properly in the case, we list below the three classes of Findings which are not included in the tabulation:

1. Findings as to situations where no particulars were given and where the independent exhibitor was still in business at the time of the trial:

Town	Independent Exhibitor	Findings
Gallatin, Tenn.	Roth	87, 88, 89
Mt. Pleasant, Tenn.	Page	92, 93
Scottsville, Ky.	Caldwell	104
Russellville, Ky.	Mitchell	105
Jefferson City, Tenn.	Hutton	106
Lexington, Tenn.	Amis	107
Livingston, Tenn.	Brown	108

The Findings as to these situations, if relevant at all, are relevant only to show that the monopolistic power of the exhibitor defendants was not sufficient to enable them to eliminate the competition of these independents. To the extent that a few of these Findings refer to alleged discriminations by distributors against the independents, they are not entitled to consideration because no particulars as to these alleged discriminations were furnished.

2. Situations where the only particulars given were as to "implied threats":

Town	Independent Exhibitor	Findings
McKenzie, Tenn.	Moore	59
Spruce Pine, N. C.	Taylor	60, 61
Greenville, Ky.	Head	102
Decatur, Ala.	Hine & Mitchell	110

It was apparently assumed by the Court that competition *per se*, or a mere threat of such competition by a circuit, amounted to a predatory practice and was unlawful, although in the reverse situation, where the independent offered the competition, there was no illegality. In these situations there was no proof or Finding of any threat

made by any defendant exhibitor that the independent would not be able to procure sufficient product. References in a few of these Findings to alleged discriminations by distributors against the independents are not properly in the case because plaintiff furnished no particulars as to such alleged discriminations.

3. Situations where no defendant exhibitor was involved:

Town	Independent Exhibitor	Findings
Newport, Tenn.	Peerless Enterprises, Inc.	70, 71, 72, 73
Dresden, Tenn.	Taylor	90, 91
Hickman, Ky.	Wiley	109

The circuit involved in the Hickman, Kentucky and Dresden, Tennessee situations was Ruffin Amusements, Inc. and the circuit involved in the Newport, Tennessee situation was Newport Amusements, Inc., and neither of these corporations was a defendant in the case and could not possibly be classified as a "defendant exhibitor" within the meaning of the complaint.

Finding 80, involving a theatre opened by G. W. Haynes in Union City, Tennessee, in 1934 is also irrelevant because the situation was not specified in any of the four bills of particulars filed by plaintiff. Indeed, most of the alleged facts referred to in this Finding were prior to the date fixed in the complaint as the commencement of the conspiracy, to-wit, August 11, 1934.

This leaves for consideration the nine situations included in the tabulation. As to Brownsville, Tennessee, however, it should be pointed out that no particulars were furnished until less than thirty days prior to the trial. A time limit of thirty days had been imposed upon plaintiff by an order of the Court,[9] and appellants insist that the Brownsville situation is not properly in the case for that reason. Our discussion of the Brownsville situation is not intended as a waiver of that contention.

[9] R. 159.

In discussing the nine situations included in the tabulation we think it necessary only to refer to the Findings of the Court to demonstrate that in no instance was there a Finding that the independent exhibitor's competition was restrained, suppressed or eliminated as the result of a shortage of product. It will be recalled that according to paragraphs 40, 41 and 42 of the complaint,[10] it was plaintiff's theory that an exhibitor should be able to exhibit each year a substantial number of the feature pictures released by three or more of the eight distributors.

BROWNSVILLE, TENNESSEE[11]

In Finding 38 it is stated that in the summer of 1935 Crescent opened the Capitol Theatre in Brownsville, Tennessee in opposition to Lawing, who had been operating the Southland Theatre in that town since 1932. In Finding 46 it is stated that Crescent acquired Lawing's theatre in April, 1936. The issue was whether or not Lawing had sufficient product for the 1935-1936 season.

It appears from Findings 40, 41 and 43 that Crescent obtained Paramount, Warner and Loew's pictures for the 1935-1936 season. This left five of the eight distributors unaccounted for.

It appears from Finding 42 that Lawing obtained the Fox product for that season.

There is no Finding as to RKO product.

It appears from Finding 139[12] that Columbia "invariably leased its product" to Crescent's competitors and "refused to sell its product to defendant exhibitors."

It is stated in Finding 154[13] that there is no evidence that Universal sold either Lawing or Crescent at Brownsville.

It appears from Finding 172[14] that Lawing contracted

[10] R. 7.
[11] R. 1372-1378.
[12] R. 1459.
[13] R. 1462.
[14] R. 1470.

for 1934-1935 United Artists product but did not play any of the pictures because he considered the price too high and the express charges on the films too high and that he made no effort to procure the 1935-1936 product.

There is no Finding that any one kept Lawing "from obtaining sufficient product to continue in business", as alleged in the bill of particulars,[15] or that he sold his theatre for any reason other than the obvious reason that he was unwilling to operate his theatre in a competitive situation. Indeed, plaintiff's counsel made no attempt to prove the allegations of the bill of particulars; and it is clear that product was no problem to Lawing because he did not even play pictures he had contracted to play.

GREENEVILLE, TENNESSEE.

In Finding 25[16] it is stated that in 1936 Crescent and Parrott & Hendren were competing in Greeneville and Maryville, Tennessee, after having erected opposition theatres in each other's towns. Parrott & Hendren subsequently sold the Greeneville and Maryville theatres to Crescent at the same time Cherokee Amusements, Inc. was formed to take over the other theatres operated by Parrott & Hendren. In Finding 21[17] it is stated that Cherokee Amusements, Inc. was organized in August, 1936.

In Finding 127[18] it is stated that Parrott & Hendren licensed Fox 1935-1936 feature product in Greeneville and paid $2,589.00, whereas Crescent licensed its product for 1937-1938 and paid $1,095.00. There is no Finding as to Fox 1936-1937 product (but Parrott & Hendren evidently licensed it before selling the theatre to Crescent).

There is no Finding as to Loew's, Paramount, Warner or RKO.

[15] R. 172.
[16] R. 1363.
[17] R. 1362.
[18] R. 1447.

In Finding 139[19] it is stated that Columbia invariably licensed its product to independent exhibitors and refused to sell its product to defendant exhibitors.

In Finding 155,[20] it is stated that there is no evidence that Universal discriminated against the independent operators in Greeneville at any time.

In Finding 173[21] it is stated that there is no evidence of any discrimination by United Artists in the licensing of its pictures at Greeneville as between Crescent and the independent exhibitors.

There is no Finding that "independent exhibitors had trouble getting pictures and were forced to sell", as alleged in the bill of particulars.[22]

EARLINGTON, KENTUCKY.[23]

In Finding 47 it is stated that in 1932 Dozier opened a theatre in Earlington, Kentucky (population 2858) distant three or four miles from Madisonville, Kentucky (population 8209), where Crescent operated a theatre. In April, 1937, Crescent opened a new theatre in Earlington. It appears from Finding 50 that Dozier sold his theatre to Crescent in August, 1939.

In Finding 48 it appears that Dozier had Paramount product in Earlington during every season.

In Finding 49 it appears that Dozier had Fox 1935-1936 product, but that Crescent had the Fox product in the succeeding seasons.

There is no Finding as to Loew's, Warner, or RKO.

In Finding 139[24] it is stated that Columbia licensed its product to Dozier.

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[19] R. 1459.
[20] R. 1462.
[21] R. 1470.
[22] R. 161.
[23] R. 1378-1383.
[24] R. 1459.

In Finding 153[25] it is stated that Universal contracted with Dozier for each of the seasons 1934-1935 to 1938-1939, inclusive.

In Finding 171[26] it is stated that United Artists sold Dozier its product for the years 1937-1938 and 1938-1939.

There is no Finding that Dozier "had trouble procuring pictures and was forced to sell", as alleged in the bill of particulars.[27] On the contrary, it is stated in Finding 50 that Dozier sold his theatre to Crescent because "he was unable to secure a sufficient number of good pictures *on a run ahead of Madisonville* to make his operation profitable". Since plaintiff made no such contention in its bill of particulars, this Finding is irrelevant.

HOPKINSVILLE, KENTUCKY.[28]

It appears from Finding 62 that in June, 1937, Anderson and partners opened a theatre in Hopkinsville, Kentucky where Crescent already operated both a first-run and second-run theatre. Anderson had been the manager of one of Crescent's Hopkinsville theatres, and had quit to open the opposition second-run theatre. It appears from Finding 66 that in November, 1938 Anderson sold this theatre to Crescent.

In Finding 63 it is stated that Crescent played Paramount pictures both first-run and second-run in Hopkinsville.

In Finding 64 it is stated that Loew's refused to sell Anderson its 1937-1938 product, second-run, but made a deal with him for those 1936-1937 Loew's pictures which had not already played a second run in Hopkinsville.

In Finding 65 it is stated that Anderson played Warner's 1937-1938 product second run in Hopkinsville.

[25] R. 1462.
[26] R. 1469.
[27] R. 155.
[28] R. 1391-1394.

In Finding 66 it is stated that Crescent played RKO pictures both first-run and second-run in Hopkinsville, although it only played nine RKO 1937-1938 features for a second run showing.

There is no Finding as to Fox.

In Finding 139[29] it is stated that Columbia licensed its product to Anderson in Hopkinsville.

In Finding 161[30] it is stated that there is no proof of any dealings between Universal and either Anderson or Crescent at Hopkinsville during the period when Anderson was in competition with Crescent.

In Finding 179[31] it is stated that United Artists sold its 1937-1938 product to Anderson, although Crescent had previously been its customer at Hopkinsville.

There is no Finding that Anderson "had trouble in getting pictures and was forced to sell", as alleged in the bill of particulars.[32]

UNION CITY, TENNESSEE.[33]

It appears from Finding 81 that John D. Henry opened the Roxy Theatre in Union City in March, 1939, and it appears from Finding 86 that he sold this theatre to Crescent in June, 1939.

It appears from Findings 82, 83 and 84 that Universal, RKO and Paramount licensed their 1938-1939 product to Crescent.

There is no Finding as to Loew's.

It appears from Finding 84 that Fox negotiated with Henry but there is no Finding as to whether Henry did or did not make a deal.

In Finding 139[34] it appears that Columbia sold its product to Henry.

[29] R. 1459.
[30] R. 1463.
[31] R. 1471.
[32] R. 155.
[33] R. 1403-1412.
[34] R. 1459.

Finding 180,[35] relating to United Artists, is as follows:

> "180. John D. Henry, operating a theatre at Union City, Tennessee, made an application for United Artists Corporation product at Union City on October 13, 1938, for twenty-seven pictures, 1938-1939 product, and ten pictures, 1937-1938 product. At the time he made his application and several times subsequent thereto, Henry detailed his plans for opening opposition theatres to the Crescent Amusement Company not only at Union City but at several other West Tennessee towns.
>
> "As soon as Henry obtained his lease on January 3rd, 1939, he advised United Artists at Atlanta to this effect, and his applications were accepted and approved by United Artists. At the same time United Artists Corporation expressed a willingness to contract with Henry at such other opposition points as he should be able to open theatres, and made every effort to cooperate with him in his opposition to Crescent Amusement Company.
>
> "He played only a small part of his contract with United Artists Corporation at Union City, and at the time of his sale to the Crescent Amusement Company owed United Artists about one thousand dollars for unplayed pictures, none of which he ever paid."

There is no Finding that Henry "had trouble procuring pictures and was forced to sell" as alleged in the bill of particulars.[36]

MORRISTOWN AND HARRIMAN, TENNESSEE.[37]

Tim Smith (Peerless Enterprises, Inc.) opened theatres in Morristown and Harriman in opposition to Crescent on March 26, 1927 and June 17, 1938, respectively, as appears from Findings 67 and 68. He subsequently closed both theatres and sold his equipment in the Harriman theatre to Crescent on February 8, 1940, as appears from Findings 68 and 73.

[35] R. 1471.
[36] R. 155.
[37] R. 1394-1399.

In Finding 70 it is stated that Smith was unable to license Paramount product second-run in Morristown where Crescent operated both a first-run and second-run theatre.

In Finding 71 it is stated that Smith was unable to license Warner product at either Morristown or Harriman.

In Finding 72 it is stated that Smith was able to license Fox product for second-run exhibition at Morristown but that Fox refused to sell him second-run pictures in Harriman.

There is no Finding as to Loew's or RKO.

In Finding 141[38] it is stated that Columbia was justified in asking for a deposit from Tim Smith before licensing him product for Harriman or Morristown, for the reason that Smith had broken a previous contract with Columbia and that his financial condition in 1938 was bad.

In Finding 156[39] it is stated that there is no evidence that Peerless Enterprises applied for Universal product at either Morristown or Harriman.

In Finding 174[40] it is stated that United Artists sold none of its product to Crescent either at Morristown or Harriman during the period in which Peerless was in competition with Crescent, but on the other hand made all of its product available to Peerless Enterprises, Inc. and made contracts with it for the exhibition of its product in those towns during the entire period of its operation there.

There is no Finding that Peerless Enterprises, Inc. "was unable to get sufficient product to operate successfully and was forced to close down", as alleged in the bill of particulars.[41] On the other hand, it appears from Finding 68 that the building where Smith undertook to operate a theatre in Harriman was being operated as a theatre at the time of the trial by the owner of the building "who did not testify in the case and is presumably able to obtain

[38] R. 1459.
[39] R. 1462-1463.
[40] R. 1470.
[41] R. 158.

a satisfactory product". If Smith was short of product, he could have obtained Columbia pictures by making a deposit, and he would have applied to Universal for pictures.

GADSDEN, ALABAMA.[42]

This situation is referred to in Findings 94 to 100 inclusive. It appears that on September 2, 1939, after the institution of this suit, a suburban or neighborhood theatre was opened in East Gadsden, Alabama, about four or five miles distant from the Alabama City section of Gadsden, where Crescent operated a neighborhood theatre. There was no evidence and no Finding that the Dixie Theatre in East Gadsden was "unable to obtain satisfactory product and is having a difficult time continuing in business", as alleged in the bill of particulars.[43] On the contrary, the only contention now made by the plaintiff as to this situation is that the distributors made product available for use at the Ritz (Crescent's neighborhood theatre in Alabama City) before making it available to the Dixie Theatre. The managers of the Dixie Theatre who testified contended that they should have been allowed to play pictures at the same time the Ritz Theatre played them, although there was no real competition between the two theatres. There were no particulars furnished as to the contention of plaintiff embodied in these Findings, and the Findings in this respect are accordingly irrelevant.

CENTRAL CITY, KENTUCKY.[44]

It appears from Finding 103 that in 1937 there were two competing theatres in Central City, the Selba and the Empress. The latter was operated by F. M. Pittman. Rockwood acquired the Selba Theatre in the latter part of 1937,

[42] R. 1420-1425.

[43] R. 171. (See R. 512-514 as to the complaint actually aired at the trial).

[44] R. 1426.

and about a month later Pittman sold the Empress to Rockwood "because he realized that he could not compete with Sudekum". There are no Findings whatever as to film deals and no suggestions in the Findings that Pittman was "unable to compete with the purchasing and booking power of defendant exhibitor chain", as alleged in the bill of particulars.[45]

ROGERSVILLE, TENNESSEE.[46]

It appears from Finding 51 that Cumberland opened the Rogersville Theatre in October, 1936, in opposition to the Palace Theatre operated by Miller. It appears from Finding 53 that Cumberland sold the Rogersville theatre to Rockwood about April 1, 1938, and from Finding 57 that Miller sold out to Rockwood in August, 1938.

In Finding 52 it is stated that United Artists licensed its 1936-1937 and 1937-1938 product to Cumberland.

In Finding 53 it is stated that Fox licensed its 1936-1937 product to Cumberland and its 1937-1938 product to Miller.

In Finding 54 it is stated that Warner licensed its 1936-1937 product to Miller and its 1937-1938 product to Cumberland.

In Finding 55 it is stated that RKO split its 1937-1938 product between Cumberland and Miller.

In Finding 56 it is stated that Universal licensed its 1936-1937 product to Miller and its 1937-1938 product to Cumberland.

There is no Finding as to Loew's or Paramount.

In Finding 139[47] it is stated that Columbia licensed its product to Miller, apparently for every season.

In Finding 57 it is stated: "One of the principal reasons for Miller's willingness to sell his theatre was the difficulty he encountered, as well as the difficulty he anticipated, in securing suitable pictures for exhibition in his theatre."

[45] R. 155.
[46] R. 1383-1388.
[47] R. 1459.

This Finding was amended by the Court so as to add to the quoted sentence: "at prices he was accustomed to pay for such pictures".[48] Thus, there is no Finding that Miller "had difficulty getting desirable pictures and was forced to sell", as alleged in the bill of particulars.[49] On the contrary, Miller's complaint was that the distributors raised their prices after competition entered the town.[50]

To Summarize: Plaintiff went to trial on the theory that these independent exhibitors were forced to sell their theatres because of a shortage of product. In two of the nine situations examined it affirmatively appeared that the independent exhibitor did not even apply to certain distributors for product and failed to play the pictures of other distributors after contracting for them (Brownsville, Tennessee, and Union City, Tennessee). In two other situations (Earlington, Kentucky and East Gadsden, Alabama), the only complaint was as to the time of playing pictures; and of course film rentals are, generally speaking, lower when pictures are played late than when played early after release date. In one situation (Rogersville, Tennessee) it was expressly found by the Court, after proper motion had been made to amend the Findings, that the independent's complaint was only as to the prices of pictures. In no instance did the evidence or the Findings of the Court support plaintiff's theory as stated in the complaint and in the bills of particulars. The burden of proof was on plaintiff. Where the Court failed to make a Finding as to some particular distributor, it will usually be found, upon an examination of the evidence, that the independent had actually licensed that product. *In no such instance was there evidence to the contrary.*

While there are Findings to the effect that various distributors "discriminated" against independent exhibitors, it must be remembered that these Findings were copied

[48] R. 1489-1490.
[49] R. 154.
[50] R. 437-442.

from plaintiff's brief and were largely based on incompetent evidence consisting of inter-office communications of the distributors. These questions will be discussed in a later portion of this brief.

It necessarily follows, we believe, that the Findings of the Court do not support the theory of the complaint and that plaintiff has utterly failed to prove the allegations of the complaint. This being true, the portions of the final decree as to which error has been assigned by appellants were necessarily and automatically erroneous. There was a fatal variance between the allegations and the proof.

We wish to stress before this Court that we are relying not merely upon the factual and legal questions involved in the case as actually determined by the District Court, but upon this fundamental defense of failure of proof of the allegations of the complaint as amplified by the bills of particulars. We think that this suit was brought by plaintiff as a result of inadequate information as to the facts,—probably as the result of complaints which had been made to the Department of Justice by such persons as Tim Smith of Peerless Enterprises, Inc.[31] The failure of plaintiff even to introduce evidence as to the great majority of the situations specified in the bills of particulars suggests a misapprehension prior to the trial as to what the facts were. The ultimate decision violates the fundamental principle that a defendant cannot fairly be convicted of violating a criminal statute, even in an equity case, where the charges on which the trial is predicated are not proved.

Even in litigation of a strictly civil nature, there has always been applied in our jurisprudence the principle that a verdict is bad if it varies from the issue in a substantial matter, and that the judgment or decree must conform to the pleadings. The principle is so well established that it may seem superfluous to cite authorities. Nevertheless it is a principle on which we think this case is to be decided,—without ever reaching for consideration the other questions

[31] R. 595-597.

discussed in the briefs,—and we ask the indulgence of the Court in citing and referring to some of the decisions of this Court:

In *Patterson* v. *United States*, 2 Wheaton, 221, this Court said:

> "The rule of law is precise upon this point. A verdict is bad, if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue. The reason of the rule is obvious; it results from the nature and the end of the pleading. Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue; and although the court in which the cause is tried may give form to a general finding, so as to make it harmonize with the issue, yet if it appears to that court, or to the appellate court, that the finding is different from the issue, no judgment can be rendered upon the verdict."

In *Boone* v. *Chiles*, 10 Pet. 177, at page 209, this Court said:

> "A party is not allowed to state one case in a bill or answer, and make out a different one by proof; the *allegata* and *probata* must agree; the latter must support the former." (citing authorities.)

In *United States* v. *Seminole Nation* (1937), 299 U. S. 417, 81 L. ed. 316, this Court said (299 U. S. 422):

> "The judgment may not be sustained as to any item that is not included in a cause of action set up in the original petition or that was by the findings of the lower court or otherwise put upon a ground not there alleged. *Harrison* v. *Nixon*, 9 Pet. 483, 503. *Boone* v. *Chiles*, 10 Pet. 177, 209. *Garland* v. *Davis*, 4 How. 131, 148. It may not be upheld as to any item that is not supported by definite findings of fact extending to all essential issues and which, unaided by statements in the court's conclusions of law or opinion, are clearly sufficient to entitle plaintiff to recover. *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 205."

Under any rule of procedure different from that laid down by this Court in the cases above referred to, it would be impossible for defendant's attorney to know how to cross-examine plaintiff's witnesses or introduce evidence on behalf of his clients. Take, for example, the statement in the bill of particulars with respect to Dozier, an independent exhibitor in Earlington, Kentucky: "Defendant exhibitor opened a second competing theatre and began to cut prices. Independent exhibitor had trouble procuring pictures and was forced to sell".[52] Crescent's theatre in Earlington was known as the Earl Theatre. Crescent also had a theatre in the neighboring and larger town of Madisonville, Kentucky. In the bill of particulars nothing was said as to clearance between Madisonville and Earlington, and according to well-established trade practices there was no question but that Madisonville would have clearance over Earlington, all other things being equal.

Dozier testified on cross-examination: "The main thing was to play ahead of Madisonville, and the Earl Theatre there, as far as that is concerned, didn't amount to anything to me on my feature pictures."[53] In other words, Dozier, as a witness for plaintiff, repudiated plaintiff's theory and announced a new theory. Was it then incumbent on defendants' counsel to continue the cross-examination in an effort to explode the new theory, after Dozier had repudiated the theory set forth in the bill of particulars? We think the answer is clearly in the negative. Nevertheless the District Court adopted Dozier's theory in the Findings which were the basis of the decree.[54]

Of course the Dozier situation is merely illustrative. We have heretofore pointed out that the Findings as a whole are at variance with the charges. Wholly aside, moreover,

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[52] R. 155.

[53] R. 404. When Dozier used the expression "the Earl Theatre there", he referred to Crescent's Earlington Theatre.

[54] Findings 47-50, R. 1378-1383.

from the point that plaintiff failed to prove the charges contained in the bills of particulars, attention is called to an equally fundamental proposition, viz., that where one large conspiracy is specifically charged, proof of different and disconnected smaller ones will not sustain a conviction or decree.[55] The complaint in the case at bar was predicated on nine large conspiracies or combinations: between the defendant exhibitors as a group and each of the eight distributors, and a ninth conspiracy or combination between the defendant exhibitors to coerce the distributors to discriminate against independent exhibitors. No one of these large conspiracies or combinations was proved. The decree is predicated on a few isolated instances of supposed discrimination by a distributor against an independent exhibitor in favor of a defendant exhibitor. The District Court treated these instances of discrimination as "combinations" (but not as conspiracies) between the particular distributor involved and the particular defendant exhibitor involved.

In Conclusion 17[56] the Court found that United Artists had combined with Cumberland, Rockwood and Stengel to eliminate the independent theatre competition at Rogersville, Tennessee. Doubtless the Court included both Cumberland and Rockwood because Cumberland built the Rogersville theatre and sold it to Rockwood after operating it for two or three years. It is to be noted, however, that the Court did not find that Crescent, Lyric, Cherokee or the other defendant exhibitors were parties to the "combination". The Court did not go into equal detail with reference to any of the distributors other than United Artists, but it must necessarily be assumed that the District Court had the same view as to the "combinations" to which the other distributors were parties, viz., that the combination in each instance was between the distributor and the

[55] For a recent criminal case applying this doctrine, see *Olivar* v. *U. S.* (C. C. A. 10, 1941), 121 F. (2d) 245.

[56] R. 1477.

particular defendant exhibitor who operated the theatre which was the beneficiary of the discrimination.

These minor combinations on which the Court predicated the decree were outside the scope of the complaint. There was no Finding or Conclusion by the Court that these minor combinations were acts in furtherance of any one of the nine large conspiracies or combinations alleged in the complaint. The situation is directly analogous to that in *U. S. v. Reading Co.* (1912) 226 U. S. 324, where this Court said at page 373:

> "As to the legality of the minor combinations, we therefore express no opinion. We affirm the action of the court below in declining to enjoin them, because to construe the bill as directed against them as independent combinations, between some but not all of the principal defendants, would make the pleading objectionably multifarious. We therefore direct that the bill be dismissed, without prejudice, in so far as it seeks relief against the three alleged minor combinations."

Without further elaboration, it is respectfully submitted that defendant exhibitors in the case at bar were clearly entitled to a decree in their favor with respect to the issues made in the pleadings, as amplified by the bills of particulars. Appellants are accordingly entitled, for that reason, to have the case reversed and dismissed in its entirety without the necessity of further consideration by this Court of the other questions raised in the appeal.

II. THEORY OF COERCION AND DISCRIMINATION.

1. The Legal Aspects.

The essential element in plaintiff's case as embodied in the complaint was the "control" of the film supply by defendant exhibitors. We think this is simply a misuse of the English language. Defendant exhibitors did not control the film supply in any sense of the word. They merely played pictures for which they had contracted pursuant

to license agreements. There was no contention that defendant exhibitors ever bought pictures and "put them on the shelf" (i.e., pay for them and not use them), or bought and played more pictures than was normal for the purpose of preventing competitors from playing them.[1] It is true that some of the film deals were "selective". That is to say, the exhibitor was permitted to reject a greater percentage of the season's product than provided in the normal printed form of contract. When these pictures were rejected, within the time limits specified, they were available to their competitors.

When plaintiff got into the trial of this case it abandoned any attempt to prove that any independent exhibitor had a shortage of product in the same sense outlined in paragraphs 40, 41 and 42 of the complaint. In most instances the witness was either not asked or was unable to testify as to exactly what product he had licensed in a particular season. Having been forced to abandon the theory of the complaint, plaintiff proceeded to prove or attempt to prove isolated cases of alleged discrimination by particular distributors.

Although the complaint as originally drafted contained allegations that the eight distributors had combined among themselves or acted in concert to assist defendant exhibitors in running their competitors out of business by depriving them of films; the complaint was amended so as to eliminate these allegations. The case thus went to trial on the assumption (which was a correct one) that the distributors were in competition with each other for the business of defendant exhibitors and their competitors. In other words, plaintiff abandoned the theory on which it originally relied in an attempt to bring the case within the scope of *United States* v. *Interstate Circuit* (1939), 306 U.

[1] The case is thus distinguishable from *White Bear Theatre Corp.* v. *State Theatre Corp.* (C. C. A. 8. 1942, 129 F. (2d) 600, and *Mid-West Theatres Co.* v. *Co-Operative Theatres* (D. C. E. D. Mich. 1941), 43 F. Supp. 216.

S. 208, where the violation was a conspiracy among the eight distributors and the defendant exhibitor.

No one of the eight distributors controlled more than a small fraction of the film supply. There were "independent" distributors in business in addition to the eight distributors named in the complaint, and more than 700 feature pictures were released in the United States market during each of the years 1935-1939, inclusive, of which approximately half were released by the eight distributors and approximately half by "independent" companies.[2] It follows that individual "combinations", even if alleged and proved, between defendant exhibitors and any three or four distributors would not unreasonably restrain competition or amount to a violation of the Sherman Act as interpreted by this court in *Apex Hosiery Company* v. *Leader* (1940), 310 U. S. 469.

The theory which plaintiff finally adopted was that any discrimination by a distributor against an independent exhibitor amounted to a violation of the Sherman Act not only on the part of the distributor but upon the part of the defendant exhibitor who was the beneficiary of the discrimination. If not a violation on the part of the distributor, it could scarcely be a violation on the part of the defendant exhibitors, unless the distributors were unwilling and helpless victims. Hence, let us first look at the situation from the standpoint of the distributor.

The contention that discrimination of this character violates the Sherman Act runs afoul of the well-settled

[2] R. 231-233. The theatres involved in this case usually made four changes of program each week. The program shown on Saturday usually consisted of a Western picture, or in some cases, a double bill including a Western picture and a low-priced feature. This adds up to an annual requirement of not more than 250 photoplays, including Westerns, the vast majority of which were distributed by independent distributors. R. 1198. The double bills on Saturday were sometimes necessary because of the short running time of the Western picture. R. 1207. The territory where appellants operate theatres is "single feature territory", so that more feature pictures are available for competing theatres than in territory where double feature programs are generally shown. R. 1204.

principle which was tersely stated by this Court in a unanimous opinion in the case of *Moore* v. *New York Cotton Exchange* (1926), 270 U. S. 593. The New York Cotton Exchange had a contract with the Western Union Telegraph Company for furnishing quotations to customers of the Exchange through a ticker service. The New York Cotton Exchange was used to furnish this ticker service to plaintiff, and plaintiff brought suit and sought an adjudication that the contract between the New York Cotton Exchange and the Western Union Telegraph Company was in violation of the Sherman Act because of the alleged discrimination against plaintiff. The Court said, at page 605:

> "In furnishing the quotations to one and refusing to furnish them to another, the Exchange is but exercising the ordinary right of a private vendor of news or other property."

A similar theory was pressed in the case of *Terminal Warehouse Co. v. Pennsylvania R. R. Co.* (1936), 297 U. S. 500, and was rejected by this Court in an opinion in which Mr. Justice Cardoza said (297 U. S. p. 511):

> "First. Discriminatory privileges and payments given by a carrier to a consignor or consignee are unavailing without more to make out a combination in restraint of trade or commerce within the meaning of the Anti-Trust Laws. To lead to that result the privileges or payments must be the symptoms or incidents of an enveloping conspiracy with its own illegal ends . . . "

After elaborating upon the foregoing proposition, this Court said (p. 515):

> "In thus holding we do not intimate that never in any circumstances can a carrier become a party to a conspiracy in restraint of trade or commerce with liability for treble damages."

The illustration was given that discrimination by a carrier in favor of a particular shipper would be in violation

of the Sherman Act if the carrier knowingly confederated with that shipper to preserve or foster a monopoly of manufacturing (an interstate business). In the case at bar the District Court expressly held that there was no "conspiracy" between any defendant exhibitor and United Artists; and the holding as to United Artists was necessarily applicable in the same way to the distributors who were voluntarily dismissed as defendants. Why in the name of common sense would any distributor knowingly attempt to foster a monopoly of exhibition? The self-interest of a distributor is to have competition among exhibitors.[3] The competitive situations which plaintiff's proof undertook to expose were almost uniformly situations where the independent was operating on a shoe-string in a small and inferior theatre.

It seems axiomatic that the monopolization of exhibition can come within the scope of Section 2 of the Sherman Act only on the assumption that it is co-extensive with and based upon a monopolization of the supply of films. Necessarily there could have been no monopolization of films by appellants except pursuant to a conspiracy or federation in which at least majority of the distributors knowingly collaborated. The mere statement of such a proposition is its own refutation, even aside from the fact that all allegations as to concert of action among the distributors were voluntarily eliminated from the complaint. The District Court's theory of a "combination" which is not a "conspiracy" in violation of Section 1 of the Sherman Act is a novel theory which, so far as we know, has never before been adopted by any Court. The complaint did not allege that there were any contracts between any defendant exhibitor and any distributor which were, in and of themselves, contracts in restrain of trade or commerce. Equally

[3] Provided, of course, that the competition is of a substantial and *bona fide* character. It would not ordinarily be to the permanent interest of a distributor to foster competition with a good customer by a shoe string operator in a shot-gun theatre.

novel is the theory that a monopoly of a local business (such as retail stores, barber shops or motion picture theatres) amounts to a violation of Section 2 of the Sherman Act merely because there has been a violation of Section 1 in connection with the obtaining of merchandise or supplies. It is unnecessary, however, for this Court to pass upon these propositions because there is no factual basis whatever for the theory of the District Court.

2. The Factual Aspects.

Since the gravamen of the District Court's decision is the supposed coercion of distributors by appellants, as the result of which distributors were forced to discriminate in favor of appellants and against independent exhibitors who were in competition with them, we next propose to demonstrate the lack of factual basis for this theory.

Let us assume a circuit having a number of theatres in different towns and no competition in any of them. Loew's and Fox have been distributing good pictures and have been spending large sums on national advertising. The circuit has licensed their pictures over a period of years at high prices in order to satisfy the public demand created by this advertising. The circuit has exploited these pictures and has played a substantial part in creating public demand for their exhibition. On the other hand, the circuit has left out Paramount and United Artists pictures for the reason that it has been unable to get together on terms with these distributors and has felt that the pictures of the other distributors have suited the tastes of the theatre-goers in their particular towns as well as the pictures of Paramount and United Artists. The circuit decides to enter an additional town where there is an existing theatre operated by an independent exhibitor who has been using Loew's and Fox pictures for several seasons. The circuit wishes to use Loew's and Fox pictures, as in its other towns, or if it cannot get them, it wishes to procure Paramount and United Artists pictures for exhibition in the competitive theatre.

The question confronting the sales managers of the four distributors is whether or not to attempt to make a deal with the circuit for its competitive theatre. In the language used by plaintiff's counsel on the trial of the case, the making of a deal with the circuit would be a "sell-away" if the independent was in the town first and had been a regular customer of the particular distributor.

It is apparent that neither Loew's nor Fox would be getting additional outlets for product by licensing pictures to the circuit rather than to the independent. They know that the circuit wants their pictures in its other towns where it has helped to build up the reputation of their pictures. They know that the circuit would be "cutting off its nose to spite its face" if it discontinued these pictures in its other towns because of its failure to procure them for its competitive theatre. Quite naturally they will consider the size and appointments of each of the competing theatres; they will consider the record of the circuit and of the independent exhibitor as to punctuality in meeting contractual obligations; and they will consider other factors which might have a bearing on the matter, including the revenue they think they can get from the circuit theatre as compared with the revenue they can get from the independent. Presumably they will desire to get higher prices and better terms in general than they have been getting in the past. In other words, they will hope to take advantage of the competitive situation.

Assuming that there is no threat, express or implied, from the circuit that it will boycott Loew's and Fox in its other towns, there is certainly no basis for a Finding of coercion if Loew's and Fox negotiate with the circuit for pictures in the entire circuit, including the competitive situation. Indeed, the "leverage" is the other way. Loew's and Fox have the opportunity of bettering their deals in the other towns in the circuit by including or continuing to include the competitive theatre in the deal.

Now let us look at the matter from the standpoint of Paramount and United Artists. They would like to have all the circuit theatres as outlets for their pictures. They say to the circuit: "Of course we aren't going to furnish you pictures for your competitive theatre, where we know you need them, unless you also include in the deal your other theatres where you have not been using them." The result is that Paramount and United Artists make deals with the circuit instead of with the independent. Again, in this situation, the coercion is the other way. The distributors have forced the circuit to take their pictures for the other towns in order to get them for the competitive theatre.[1]

The "coercion" found by the District Court was simply the desire of the distributors to get appellants' business,—a natural desire in the business world. We submit that the effort of the distributors to procure the greatest possible return for their pictures is not the fair legal equivalent of "coercion" of the distributors by the defendant exhibitors.[2]

Plaintiff did not contend in the District Court that there was any discrimination by "sell-aways" unless the distributor, looking at the two exhibitors in the particular town and disregarding the ownership or operation of other theatres by either exhibitor, *would otherwise have preferred to deal with the independent*. The District Court made no Findings as to actual preference in such cases, but did find that in practically every instance the circuit theatre was superior to the independent theatre; and that, as a general proposition, the independent exhibitors had been poor accounts in that they had not been punctual in complying with contractual obligations and had frequently insisted upon adjustments on the previous deal as a condition to making a deal for the ensuing season. Under

[1] See R. 752, 828-829, 856-857.

[2] As to the resources and economic power of the distributors, see R. 178-195. The revenue which a distributor could obtain from defendant exhibitors was relatively too small to cause the distributors to depart substantially from their own ideas of film rentals and terms. See R. 832, 1014-1015, 1024-1025.

these circumstances, the distributor naturally preferred to do business with the circuit rather than the independent, wholly aside from the other theatres involved.

For the convenience of the Court these Findings are here copied:[3]

"111. The theatres maintained by the defendant exhibitors and their affiliates in the towns in which they operate are modern and up-to-date in their appointments; are attractive in appearance, for the most part have been originaly built as motion picture theatres, have adequate seating capacity, and the equipment and buildings are well maintained. They have large sums invested in buildings and equipment. The management is competent and experienced. The exhibitor defendants and their affiliates are adequately financed, are financially responsible, have stablizied the operation of motion picture theatres in the small towns in the area in which they operate, and have the reputation of playing out their contracts as agreed.

"112. For the most part theatres operated by independents in competition with the defendant exhibitors and their affiliates have been greatly inferior to those operated by the defendant exhibitors or their affiliates in the several competitive situations.[4] Usually the theatre building was a converted store building, not built for the purposes of a theatre, unattractive in appearance, inadequate in modern conveniences. In many instances the equipment has been second hand. Some operations have been inadequately financed, and in a number of cases there was no stability of operation in these independent situations.

"The distributors have found it necessary by reason of this instability of operation and inadequate financing in some instances, to make large concessions from the contract terms originally agreed upon, or to

[3] R. 1428-1429.

[4] This Finding was amended (R. 1491) to specify the only two exceptions: Henry's theatre in Union City, Tennessee, as compared with Crescent's second-run theatre in that town (Finding 81, R. 1403) and the Dixie Theatre in East Gadsden, Alabama, as compared with Crescent's theatres other than its first-run theatre (Finding 94, R. 1421).

accept cancellations of obligations to exhibit pictures as originally called for under the contract."

The evidence shows, moreover, that distributors did not uniformly "sell away" from the independent but either continued to do business with the independent (e. g., Fox at Brownsville, Gallatin and Greeneville)[5] or split the product between the two competitors (e. g. RKO at Rogersville).[6] There is not a shred of evidence that appellants or any of them ever discontinued or threatened to discontinue the product of any distributor because of the failure or refusal of the distributor to sell away from an independent competitor. The theory of coercion which is the basis of the decree was, we submit, wholly without support in the evidence.

We next propose to examine the actual cases of supposed coercion and discrimination reflected in the Findings. Since plaintiff took the position that a distributor *preferred or should have preferred* to deal with its "old customer" in a particular town, our inquiry here may properly be confined to the situations where there was a "sell-away" from the old customer. The Findings include four such situations, Brownsville, Rogersville, Greeneville and Gallatin. As to Gallatin, however, no particulars were furnished (the situation was specified as a town where there was competition, but without any particulars whatever as to discrimination)[7] and the Findings as to Gallatin are accordingly irrelevant under any aspect of the case.

In these three situations, Brownsville, Greeneville, and Rogersville, the independent theatres were small and inferior. There is no suggestion in the Findings that these theatres and their independent operators were exceptions to Findings 111 and 112.

Lawing's theatre at Brownsville was a converted store building. His original investment was about $200.00 in cash

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[5] R. 311, 847.

[6] R. 430, 442.

[7] R. 158.

and some second-hand equipment contributed by Lawing and $50.00 contributed by his partner. The screen was in the front end of the building and his projection machine on the outside of the building extended out over a vacant lot. His theatre had no rest-room. The seating capacity was originaly 180 but was later increased to 200 downstairs and 25 or 30 in the balcony. Crescent's theatre was modern and up-to-date and much larger than Lawing's theatre.[8]

Parrott & Hendren's theatre in Greeneville was poorly equipped. The citizens of Greeneville requested Mr. Sudekum to come to Greeneville and open up another theatre. For some time Sudekum endeavored to find a location and finally obtained a building which he remodeled into a modern, up-to-date theatre with a seating capacity of 721 at a cost of $35,000.[9]

Miller's theatre in Rogersville was operated in an old warehouse. It had no sewerage connection and its heating system was improvised by Miller who rigged up a twenty-horsepower threshing machine boiler in an outhouse. Cumberland built a modern theatre in the town.[10]

Quite obviously the citizens of those three towns deserved better theatres than they had and quite obviously each distributor would have preferred to deal with the new theatre operated by the circuit, wholly aside from other theatres of the circuit in other towns. Findings 111 and 112 give ample reasons and justification for such a preference. There is no Finding and no suggestion by the District Court that, had it not been for the other theatres of Crescent in the case of Brownsville and Greeneville, or Cumberland in the case of Rogersville, the distributors would have preferred to deal with the independents.

We shall now refer to the Findings of discrimination: *Brownsville:* Finding 40[11] is to the effect that Paramount

[8] R. 322, 748-749.
[9] R. 952-953.
[10] R. 436, 444.
[11] R. 1373.

licensed its 1934-1935 product to Lawing but licensed its 1935-1936 product to Crescent as part of a 19-town deal without even negotiating with Lawing. There is no suggestion that Lawing had been a consistent user of Paramount product, and the evidence was that he had not been a consistent user and had not been a satisfactory account.[12] Lawing himself testified that he would have had to secure reduced film rentals from Paramount before he could have licensed the product for 1935-1936,[13] and there is no evidence that he made any effort to negotiate for it. In Finding 115[14] it is stated, in effect, that the 19-town deal referred to in Finding 40 was made by Crescent at the suggestion of Paramount's District Manager, Mr. Morgan, in an effort to help along Crescent's negotiations regarding the Paramount Theatre in Nashville. This Finding,—that Paramount's Nashville theatre was the motivating factor,—necessarily excludes the theory that Crescent made the 19-town deal in order to get Paramount pictures for its Brownsville theatre as distinguished from its theatres in the other eighteen towns, or that Paramount was coerced to include Brownsville in the deal.

Finding 44[15] is to the effect that Warner licensed its 1934-1935 product to Lawing, but licensed its 1935-1936 product to Crescent after refusing to discuss a deal with Lawing. Again, there is no suggestion that Lawing had been a consistent user of Warner product and there was affirmative evidence that he had been a troublesome account.[16] Warner received substantially more from Crescent for its 1935-1936 product than it had received from Lawing for the prior season's product.[16] In this Finding 44, it is

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[12]R. 669-672.

[13]R. 325. See also R. 720 and defendant's Exhibit 235, R. 1352, as to film rentals paid by Crescent as compared with prior film rentals paid by Lawing.

[14]R. 1430.

[15]R. 1374.

[16]R. 1100-1108.

also stated that either Ochs, Warner's Memphis Exchange Manager, or Byron Adams, a Warner salesman, told Lawing "that their hands were tied in any situation Crescent had gone into". Although neither Ochs nor Adams testified in the case, and neither of them was charged with being a co-conspirator, it is significant that the District Court quoted Lawing's wholly incompetent testimony as a part of a finding of fact. Actually there was no evidence and not even a contention by the plaintiff that Warner's deal with Crescent for Brownsville was part of a circuit deal or that it was in any way conditioned by either party upon the making of a deal for any other town.

Finding 42[17] is to the effect that Fox licensed both its 1934-1935 and its 1935-1936 product to Lawing, and that the 1935-1936 product was licensed to Lawing prior to February 1f, 1935. This Finding demonstrates that Fox made the deal with Lawing at a very early date and without even waiting to see whether Crescent wanted to negotiate for the product,—exactly the reverse of the allegations of paragraph 47[18] of the complaint.

Findings 43-45[19] are in regard to negotiations by Loew's with Lawing and Crescent, finally resulting in a deal for 1935-1936 product with Crescent in December, 1935. The Findings contain excerpts from letters or memoranda from Willingham, a Loew's salesman, to Loew's New York Office. In view of the inclusion in the Findings of these excerpts from Willingham's communications, and the emphasis placed on them by plaintiff and the District Court, it will be necessary to examine the evidence in some detail.

Willingham was introduced as a witness by plaintiff and was asked to identify these communications. He testified that he wrote them on or about the dates they bore. He was not asked to testify as to the truth of any of the statements in these communications or as to whether they had

[17] R. 1374.

[18] R. 8.

[19] R. 1374-1378.

any basis in fact.[20] On cross-examination, Willingham was asked to identify other letters which he had written both to Loew's New York Office and to Lawing himself. These communications were in many respects contradictory and inconsistent with the ones introduced by plaintiff, and Willingham was forced to admit that the statements contained in these latter communications were true.[21] The sum and substance of the evidence was that Willingham was a prolific writer and had little regard for consistency.

The principal letter relied upon by plaintiff was dated January 22, 1936, written to the New York office with reference to a deal with Lawing for the latter's theatre in Whiteville, Tennessee. Willingham said:

> "As you know, this exhibitor operates the Southland Theatre, Brownsville, Tennessee. He has been using our product in Brownsville ever since he has been in business and paid excellent rentals. However, we refused to sell him the 1935-36 product in Brownsville this season because Mr. Tony Sudekum has opened a theatre in Brownsville and we had to sell our product to Mr. Sudekum." (Ex. 167).[22]

We think this letter was obviously incompetent. It was written about six weeks after the deal between Crescent and Loew's had been made. It was not alleged or contended that Willingham was a co-conspirator or that this letter was written in furtherance of any conspiracy between Loew's and Crescent. There was no *other* evidence that Loew *had* to sell its product to Mr. Sudekum.

On cross-examination Willingham testified that Loew's had trouble with Lawing about getting him to date and play newsreels and other short subjects which he had contracted to play, as well as feature pictures, and that letters written by him to Lawing on this subject correctly stated

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[20] R. 733-742, 746-747.

[21] R. 757-764.

[22] R. 742.

the facts.[23] On October 25, 1935, about six weeks before Loew's closed with Crescent on the 1935-36 product, Willingham wrote to Lawing in regard to the latter's theatre in Brownsville as follows (Def. Ex. 56):

> "The writer has just reviewed your account and finds it to be in a most deplorable condition. I never realized until now that you are absolutely ignoring our product and not giving us any dates whatever.
>
> "Attached is notice of availability for features and short product and if there is another account in the United States in a worse condition, we would like to know just who it might be.
>
> "We are going to insist that you give us dates in abundance, playing two pictures per week in Brownsville, starting immediately, in order to catch up as you are so far behind this will be the only possible way you can catch up on your playing arrangement."[24]

In Findings 44 and 45,[25] it is stated that Lawing's offer for Loew's 1935-1936 product was "as good as, if not better than" the deal Loew's accepted from Crescent. These statements are not supported by the record. The Lawing application called for fifty feature pictures with the privilege of eliminating five of the pictures. Crescent actually played 46 of these pictures, at a film rental, including score charges, aggregating $1,021.95.[26] The Lawing application on a flat rental basis, assuming the playing of these same 46 pictures, would have resulted in film rentals of $911.50, including score charge. It is true that the Lawing application called for the playing of 12 pictures at a guaranteed price against percentage, but there is no reason to suppose that Loew's would have received an "overage". Further-

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[23] R. 759-764.

[24] R. 760.

[25] R. 1375-1378.

[26] R. 807, 1345-1346; (Lawing's rejected application was part of Gov't. Ex. L-18, which was not sent up with the record to this court). Even Mr. Willingham regarded the Crescent deal as "commensurate with" Lawing's offer, which was rejected. R. 308.

more; it appears that Crescent's 1935-1936 contract provided Loew's additional revenue of $575.00 from trailers, shorts and newsreels.[27]

The evidence showed that Lawing told Willingham, and Willingham in turn advised the New York Office, that Lawing could not pay as much for the 1935-1936 product as he had previously been paying.[28] In 1934-1935, Lawing had played 41 feature pictures at a total film rental of $765.69, and had paid an additional $321.00 for trailers, shorts and newsreels, or a total film rental of $1,086.69. Loew's obtained from Crescent a total of $1,569.95 for the 1935-1936 product.[29]

The testimony of Lawing and Willingham on cross-examination conclusively demonstrates that Loew's natural preference in Brownsville would have been to deal with Crescent rather than Lawing, wholly aside from any other theatres owned and operated by Crescent. (At that time Crescent had theatres in only nineteen other towns, exclusive of Nashville, where Loew's operated its own theatre; Sudekum was not making film deals for Lyric, because Crute was still living; and Rockwood and affiliates had not yet been organized). Indeed we think the amount of consideration given by Loew's executives to the question of whether or not to license the product to its old customer, Lawing, is remarkable in view of the character of Lawing's theatre and his past record. It was perhaps induced by Willingham's express desire to deal with Lawing rather than Crescent. There is no evidence that any weight whatever was given by Loew's to the fact that Lawing's opposition was a circuit theatre. The principal consideration on one side appears to have been the fact that Lawing was an old customer, and the principal consideration the other way appears to have been the fact that Lawing was unable to

[27] R. 811-812, 1345-1346.
[28] R. 324-325; 751, 757.
[29] R. 811-812; 1345-1346.

pay as much film rental as was to be expected from his competitor, and had been a poor account in the past.

There is no suggestion that Crescent threatened Loew's with a boycott if it did not obtain Loew's product for Brownsville and there is no suggestion that Loew's made the deal for Brownsville in order to make a deal for other Crescent theatres. The undisputed evidence was to the contrary.[30] Crescent had previously used Loew's product in its other theatres and there is no reason to assume that it would not have continued to use it regardless of the Brownsville situation.

To sum up the Brownsville situation, it appears that Crescent was able to license the product of three distributors, Paramount, Warner and Loew's, who had previously had one or more deals with Lawing. There is no Finding or evidence that any of these three distributors would have preferred to deal with Lawing, rather than with Crescent, had it not been for Crescent's business in other towns. There is no Finding or evidence that Crescent attempted to coerce any of the three distributors or would have been able to coerce them if it had so desired.

A careful comparison by the Court of Findings 43-45 with Lawing's testimony, Willingham's testimony and letters, and the testimony of Kirk, the office manager in Willingham's office,[31] will give the Court a fair indication of the character of the Findings as a whole, and demonstrate that they are inconsistent with the competent evidence in the record.

We have previously stated that no particulars as to the Brownsville situation were given until less than thirty days prior to the trial of the case;[32] and the foregoing discussion is not to be construed as a waiver of that point.

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[30] R. 1009-1026.

[31] Lawing, R. 324-325; Willingham, R. 733-753 and R. 755-778; Kirk, R. 805-825, and Defendants' Exhibit 58, R. 1345-1346, which was at first stricken but later admitted, R. 810-812.

[32] R. 172.

Greeneville: There are only two references in the Findings which might be construed as Findings of discrimination against Parrott & Hendren at Greeneville,—both in the discussion of "Franchises".

In Finding 120 it is said: "Crescent also took the 1935-1936 Warner product away from Parrott & Hendren at Greeneville".[33] There is no Finding or evidence, however, either that Parrott & Hendren had used Warner product of the 1934-1935 season, or that they wanted it for the 1935-1936 season. The Finding that Crescent "took the 1935-1936 product away" is wholly unsupported by the evidence.

In Finding 127 it is said: "Hendren's letter of February 7, 1936 (Ex. 258) indicates that if he could have gotten the Fox 1936-1937 product he would have discontinued negotiations with Sudekum for the sale of Maryville and Greeneville. . . . For the 1935-36 product in Greeneville he paid $2,589.00 against $1,095.00 paid by Crescent for 1937-38 (Ex. 328)."[34] There was no sell-away. The undisputed evidence was that Parrott & Hendren had Fox product at Greeneville as long as they operated a theatre there.[35] There was not the slightest evidence that Parrott & Hendren failed to make a deal for Fox 1936-1937 product before selling the theatre to Crescent in August, 1936, and plaintiff made no such contention on the trial when the letter was introduced.[36] The contention made in the brief and copied in the Findings was an afterthought based on a deduction from Hendren's letter. Since the burden of proof on all issues was on plaintiff and no attempt was made on the trial to prove a sell-away by Fox at Greeneville, there was no occasion for defendants to introduce the contract

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[33] R. 1439.
[34] R. 1450.
[35] R. 847, 855.
[36] R. 927-928.

for the 1936-1937 product made by Fox with Parrott & Hendren.[37]

The Finding suggests that Parrott & Hendren paid too much for the Fox 1935-1936 product, as evidenced by the fact that Crescent licensed the 1937-1938 product at considerably smaller film rentals. There is no suggestion or Finding, however, that Fox charged Parrott & Hendren exorbitant rentals as a part of a conspiracy with Crescent, or for any reason than Fox's desire to get as much revenue as possible and Parrott & Hendren's poor judgment in making a deal with such high film rentals. When Parrott & Hendren licensed the 1935-1936 product, there was competition in Greenville, of which Fox perhaps took advantage.

To sum up the Greenville situation, there is no Finding and not the slightest evidence of discrimination by any distributor against Parrott & Hendren, and no evidence of any attempt by Crescent to coerce any distributor, or any evidence that Crescent could have coerced any distributor if it had so desired.

Rogersville: The theatre involved in the Rogersville situation was built by Cumberland Amusement Company, which operated thirteen theatres in ten towns whose 1940 populations varied from 1,500 to 5,300.[38] Cumberland never combined or collaborated with any other defendant exhibitor in negotiating film deals. There are Findings as to such collaboration by other defendant exhibitors (Findings 32, 33, and 34),[39] but Cumberland is conspicuous by its absence.

[37]In view of the above quoted statement from Finding 127, however, we think it fair to refer to statement of plaintiff's counsel at page 3209 of the original transcript of evidence (not designated as a part of the record on the appeal): "In Greenville, Crescent didn't buy the Fox pictures and only two were played which had been previously bought by Hendren from the 1936-1937 season".

[38]R. 1360. The consent decree in the Paramount case recognizes that there must be at least fifteen theatres in the circuit before "circuit buying power" becomes significant. R. 208.

[39]R. 1368-1371.

from these Findings. The evidence was that prior to his death Mr. Hill did the film buying for Cumberland. Mr. Hill was succeeded by Mr. Oldham.[40] The local manager at Rogersville, Mr. Davis, attempted to negotiate some, if not all, film deals for the Rogersville theatre, without regard to the deals for the other Cumberland towns.[41] For reasons hereinafter appearing, however, certain of the distributors insisted upon deals which included all the Cumberland towns.

Finding 52[42] is to the effect that Miller, the independent, used United Artists product of the 1934-1935 season and the 1935-1936 season, but that United Artists sold away from Miller and licensed both the 1936-1937 and the 1937-1938 product to Cumberland. It appeared that Cumberland had not been using United Artists pictures prior to the 1936-1937 season, but needed them in Rogersville where it had opened its new theatre, and United Artists negotiated a deal with Cumberland for all the latter's theatres. Finding 52 includes a quotation from a report dated September 16, 1936, made by a United Artists representative who was not introduced as a witness (Ex. 221) as follows:

> "In Rogersville, Hill has opened a new theatre and we will have to play with Hill because this is the only spot in all of the fifteen towns where there is any competition and Hill has demanded that we approve all contracts or none."

Pretermitting the competency of this salesman's statement, and treating it as evidence, it would appear that after Cumberland had negotiated a deal for all its theatres, some question arose as to whether United Artists would approve the Rogersville deal, and Hill insisted that United Artists approve all contracts or none. Since Cumberland had not previously been using United Artists product, it is

[40] R. 968.
[41] R. 425, 856-857.
[42] R. 1383-1386.

obvious that by making a deal with Miller rather than Cumberland, United Artists would not have lost any business it previously had. United Artists was actually getting new business by using Rogersville as the lever. If this situation involved coercion, we insist that United Artists coerced Cumberland rather than the reverse. It appears from Conclusion 17,[43] however, that, in the view of the District Court, Cumberland coerced United Artists when, *after* Hill agreed to buy United Artists product for his nine other towns so that he could get it for Rogersville, Hill demanded that United Artists approve the deal for Rogersville as well as the other towns.

Finding 52 further indicates that United Artists attempted to follow the same policy with respect to the 1937-1938 season.

Finding 53[44] is to the effect that Miller played Fox pictures in the 1934-1935 and the 1935-1936 seasons, but that Fox sold away from Miller to Cumberland for the 1936-1937 season. Thereafter, Fox sold Miller its 1937-1938 product, as it did not make a deal with Cumberland for that season.

The evidence indicates that Fox followed much the same policy as United Artists. Miller also operated a theatre at Sneedville, and Miller testified that the Fox salesman told him that he would not sell for Rogersville unless Miller also bought for Sneedville.[45] A Fox representative who testified in the case, Paul Wilson, also testified that Fox refused to sell the 1937-1938 product to Cumberland at Rogersville because it had not been able to make a deal with Cumberland for its theatres in its other towns.[46] In other words, Fox used Rogersville as a lever in attempting to force Cumberland to make a deal satisfactory to Fox for its other towns, and when Cumberland failed to make the

[43] R. 1477-1478.
[44] R. 1386.
[45] R. 440.
[46] R. 856-857.

proposed deal, Fox declined to license its 1937-1938 product to Cumberland for Rogersville and "sold away" to Miller.

Wilson also testified that Miller had not been a regular Fox customer; that he had been hard to get along with; that he had "complained about the pictures, the bookings, and everything".[47]

Finding 54[48] is to the effect that Miller played the Warner 1936-1937 product and made an application for the 1937-1938 product but that Warner licensed the latter product to Cumberland as a part of a circuit deal. It also appears from Finding 54 that the Cumberland deal called for a total guaranteed rental on feature pictures of $35 more than the total specified in Miller's offer, but that Miller's offer called for eighteen pictures at a percentage against a guarantee, and that Warner might possibly have received more money by making a deal with Miller because of this percentage feature. This is pure speculation. Nothing is said in Finding 54 as to short subjects; and, of course, a distributor considers a deal not merely on the basis of feature pictures but on the basis of the entire deal.

Miller had not been an old customer of Warner. On the contrary, he had not used Warner product prior to the 1936-1937 season and licensed it for that season to take the place of Fox pictures after Fox had made a deal with Cumberland.[49]

Finding 55[50] is to the effect that RKO made a split deal for its 1937-1938 product between Miller and Cumberland, and that its excuse for not offering Miller the entire product was that it might thereby be knocked out of a deal for the remainder of Cumberland's theatres. There is no evidence, however, that Cumberland made any threat that it would refuse to make a deal for its other towns if RKO licensed its entire product to Miller in Rogersville. It is

[47] R. 848.
[48] R. 1386.
[49] R. 430, 440.
[50] R. 1387.

stated in Finding 55 that Miller had licensed the entire RKO product in previous seasons[51] (although Cumberland had the opposition theatre) and there was no evidence that during these previous seasons Cumberland had refused to deal with RKO on that account.

To sum up the Rogersville situation, there was no Finding or evidence that, leaving out of consideration Cumberland's other theatres, any distributor would have preferred to deal with Miller rather than Cumberland in Rogersville. There was no evidence of any attempt by Cumberland to coerce any distributor, and no evidence that Cumberland could have coerced any distributor if it had so desired. While the Court was of the opinion that Cumberland had coerced United Artists, we think the evidence was to the contrary and that the Court's conclusion was unwarranted.

In none of the three situations,—Brownsville, Greeneville and Rogersville,—was there any evidence that any distributor lost business which it enjoyed in a prior season, or was threatened with loss of business which it had enjoyed in a prior season, as the result of making a deal or negotiating for a deal with the independent. In other words, there was no evidence of a boycott or threatened boycott. Each of the independents,—Lawing at Brownsville, Parrott & Hendren at Greeneville, and Miller at Rogersville,—had or had available the product of three or more of the eight distributors (as well as independent product) during each season, and none of these eight distributors lost any business as the result of doing business with the independents. The only leverage exercised was that exercised by the distributors themselves.[52] When a particular distributor did not make a deal for non-competitive situations with the defendant exhibitor in any season, the only reason was the failure of the parties to get together on film rentals and terms.

In the consent decree in the Paramount case, there is a

[51]But see Miller's testimony, R. 441.

[52]R. 752, 828-829, 856-857.

paragraph outlining the factors to be considered in arbitration cases where two competing exhibitors desired to license the same product. In every case of supposed discrimination involved in the case at bar, we believe the so-called independent would have lost an arbitration proceeding under the consent decree. The paragraph in question, contained in Section X, is as follows:

> "C. In determining whether the exhibitor's complaint is established by the evidence, the arbitrator shall take into consideration, among other things, the following factors and accord to them the importance and weight to which each is entitled, regardless of the order in which they are listed:
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> the terms, if any, offered in respect of each of the two competing theatres;
>
> the seating capacity of each of said theatres;
>
> the capacity of each for producing revenue for the distributors;
>
> the character, appearance and condition of each, including its furnishings, equipment and conveniences;
>
> the location of each of said theatres;
>
> the character and extent of the area and population each serves;
>
> the competitive conditions in the area in which they are located;
>
> their comparative suitability for exhibition of the distributor's features on the run requested;
>
> the character and ability of the exhibitor operating each and his reputation generally in the industry and in the community for showmanship, honesty, and fair dealing;
>
> the policy under which each of the theatres has been operated and the policy under which the com-

plainant proposes to operate his said theatre if he obtains the run requested;

the financial responsibility of the exhibitor operating each of said theatres; and

the distributor's prior relations with each of the two theatres involved and with their owners and operators and any equities arising therefrom."[53]

As we understand the last clause, above quoted, it is proper to take into consideration not only the two theatres involved, but also the distributor's prior relations with their owners and operators. Where one of the theatres is a new theatre, the distributor's prior relations with the owner and operator of that theatre would necessarily have been with respect to other theatres, if any, owned and operated by the same exhibitor. For example, when Crescent opened its new theatre in Brownsville, Tennessee, Loew's had had prior relations with Crescent in other towns. By reason of these prior relations with Crescent in other towns, Loew's knew the character and ability of Mr. Sudekum, his reputation for showmanship, honesty and fair-dealing, and the financial responsibility of Crescent Amusement Company. If the consent decree had been in effect at that time, these matters would have been considered by the arbitrator as well as the seating capacity of the two theatres, the capacity of each for producing revenue for the distributors, etc.

The *most* that can be said of plaintiff's case on the theory of coercion and discrimination is that the evidence was *consistent* with this theory as well as with the theory that there was no coercion and no discrimination. Where circumstantial evidence is equally consistent with two theories, it is well settled that judgment must go against the party having the burden of proof.[54] It is equally well settled

[53] R. 209-210 (paragraphing supplied). Cf. Findings 111 and 112, R. 1428-1429, copied *supra*, pp. 51-52.

[54] *Pennsylvania Railroad Co.* v. *Chamberlain* (1933), 288 U. S. 333, 339.

that the defendant in a case of this character is entitled to the presumption of innocence.[55] These principles have been uniformly applied in cases under the Sherman Act.[56]

III. FINDINGS AGAINST APPELLANTS NOT ENTITLED TO PRESUMPTION OF CORRECTNESS.

All other questions aside, there are two reasons why, as we insist, the Findings of the District Court, to the extent that they are against appellants, are not entitled to a presumption of correctness in this Court.

1. Findings Based on Incompetent Evidence. (Assignments of Error 18 and 19).[1]

The Findings of the District Court, to the extent that they are against appellants, are in very large measure based upon letters and other communications written by employees of distributors either to other employees or to persons other than appellants. Frequently these letters and communications were written by a superior to a subordinate, or vice versa, to justify or excuse some line of action in connection with a deal or proposed deal, and the facts were obviously colored or switched to fit the argument. It was proved or stipulated that these letters and communications were written on or about the dates they bore by the persons whose signatures they bore and were sent to the persons to whom they were addressed. In some cases the authors of the documents were introduced as witnesses but were not asked to testify and did not testify as to the truth of the statements contained in the documents. Where the documents were introduced by stipulation, there was necessarily no testimony by the au-

[55] *Interstate Commerce Commission* v. *Chicago G. W. Ry.* (1908), 209 U. S. 108, 119-120.

[56] *U. S.* v. *United Shoe Machinery Co.* (1918), 247 U. S. 32; *U. S.* v. *New York Coffee & Sugar Exchange, Inc.* (1924), 263 U. S. 611; *U. S.* v. *International Harvester Co.* (1927), 274 U. S. 683.

[1] R. 139, 1515-1517.

thors as to the truth of the statements. The defendants objected to the introduction of these documents and at the conclusion of plaintiff's proof in chief made a formal motion to exclude them, which was overruled by the District Court.[2]

In order that the Court may readily see the nature of these communications and the prejudicial effect resulting from their introduction, we shall refer specifically to several of the documents which are actually quoted from in the Findings.

In Finding 44 there are quotations from two reports or letters written by Willingham (Loew's Memphis Manager) to Loew's New York office. In one of them, dated July 30, 1935, Willingham said: "We might add Mr. Kessnich, on his last visit to Memphis, told us to go ahead and sell this contract as Mr. Lawing was entitled to our product."[3] In another one, dated January 22, 1936, Mr. Willingham said: "However, we refused to sell him the 1935-36 product in Brownsville this season because Mr. Tony Sudekum has opened a theatre in Brownsville and we had to sell our product to Mr. Sudekum."[4]

Willingham testified as a witness in the case but did not testify that either of these statements was true.[5]

In *Dwyer* v. *Dunbar* (1886), 5 Wall. 318, one Smyth gave a deposition in which he testified that he wrote a letter to one Charles Russell, and this letter was attached to the

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[2] R. 366-369, 382, 653, 732, 930-932, 941-942. While the District Court at first ruled that such documents were admitted only provisionally, R. 368, he later came to the conclusion that they might be offered "for the purpose of also proving the conspiracy", R. 652, and was "inclined to agree" with plaintiff's counsel that such letters were "better evidence than any oral statements elicited four years later as to what happened." R. 843.

[3] R. 1376.

[4] R. 1376-1377.

[5] R. 734-735. The letters themselves are found, respectively, at pages 739 and 742. The untrustworthiness of such letters becomes evident when comparison is made with Willingham's other letters, R. 758-764.

deposition. All that Smyth said about the letter in the deposition was as follows:

> "The letter of this affiant to Charles Russell was written in reply to a letter of said Russell wishing to know the circumstances respecting the settlement made in the Dunbar claim by me."

The defendant, who had offered Smyth's deposition, undertook to rely upon statements contained in the letter as evidence. The District Court excluded the letter on the ground that Smyth had nowhere stated in his deposition that what he said in his letter was true. This action of the District Court was assigned as error and this Court said:

> ". . . The letter, of itself, was clearly not evidence. There being no proof of the truth of its contents, it was within the definition of *res inter alios acta*. It was simply a narrative to a third person of a past transaction, in relation to which the writer was a competent witness, and gave his deposition. . . ."

These communications were apparently introduced, however, on the assumption that they amounted to declarations by co-conspirators in the furtherance of a conspiracy and hence were admissible against all co-conspirators. Analyzing the complaint, it appears that nine separate conspiracies were charged, viz., a separate conspiracy between the defendant exhibitors as a group and each of the eight distributors, and then a ninth conspiracy among the defendant exhibitors to coerce the distributors. The District Court expressly held as to United Artists, the only distributor found guilty, that there was no conspiracy between United Artists and any defendant exhibitor.[8] The holding was, in substance, that Cumberland had coerced United Artists and that this amounted to a "combination" but not a "conspiracy" between Cumberland and United Artists. Pre-

[8] R. 1478.

sumably the Court had in mind the same theory with respect to the five distributors who were dismissed as defendants. There was no Finding or Conclusion as to any conspiracy whatever.

The principle involved is stated in *Richards v. United States* (C. C. A. 8, 1909) 175 Fed. 911, at page 948. In that case the District Court had charged the jury to the effect that, once a conspiracy or combination is established, and the defendant's connection therewith is shown by independent evidence, the defendant is bound by the acts and declarations of his co-conspirators. The Circuit Court of Appeals said:

> "The fatal objection to this charge was the failure to recognize and declare the established rule that, while whatever is said or done by either one of the parties may bind the others, it must be said or done in furtherance of the common design; . . ."

In *Dowdy v. United States* (C. C. A. 4, 1931), 46 F. (2d) 417, at page 425, it is said:

> ". . . It is well settled that before such a statement or declaration is admissible, it must not only be made during the continuance of the conspiracy, but it must be made in furtherance of it. These statements were nothing more than a confession by Martin implicating Funk, and all the authorities hold that they are inadmissible, except as against the party making them . . ."

Assuming that there had been established by independent evidence a conspiracy or combination between Crescent and Loew's, a declaration by Willingham was nevertheless incompetent unless Willingham was also a co-conspirator and made the declaration in furtherance of the conspiracy. A corporate conspirator must act through agents; but if Loew's was a conspirator, it does not follow that every employee of Loew's was a conspirator. Certainly Willingham was not a party to the conspiracy, because Willingham wanted Loew's to license the product to Lawing rather than

to Crescent. By no stretch of the imagination could these letters written by Willingham be said to have been written in furtherance of a conspiracy which had been established by independent evidence.

Indeed these letters written by Willingham would not have been admissible even against Loew's, if Loew's had been a party to the case. In *Winchester & Partridge Mfg. Co. v. Clegry et al* (1885) 116 U. S. 161, the vendee of personal property brought a suit for the recovery of the property against an officer who had seized it on a writ of attachment against the vendor. The defense was that the sale was collusive and was made pursuant to a conspiracy between the vendor and vendee to defraud the vendor's creditors. To prove this conspiracy the defendants offered declarations of plaintiff's agent, one Spaulding, whom plaintiff had put in possession of the property after he had purchased it. This Court said at page 167:

> "Spaulding was plaintiff's agent to control and manage the property. It was not within the scope of his agency to make admissions or declarations as to the circumstances under which, and the purpose for which, the plaintiff bought the property. Such admissions or declarations are only recitals of the details or circumstances of a past occurrence, and are not proof of the existence of the occurrence. They constitute, in their essence, hearsay evidence."

In the case at bar Loew's was not a party defendant and it is unnecessary to decide whether Willingham's declarations would have been admissible against Loew's. Without further elaboration, however, it seems entirely clear that they were not admissible against the defendant exhibitors: (1) because there was no proof of a conspiracy by independent evidence; (2) because, assuming such a conspiracy, Willingham was not a party to the conspiracy even though he was an employee of Loew's; and (3) assuming a conspiracy to which Willingham was a party, these letters were not written in furtherance thereof.

In Finding 48 there is copied a letter from Reagan of Paramount to Howard of Paramount.[7] Reagan was in Paramount's New York office and Howard was the Exchange Manager in Indianapolis, Indiana. Dozier, an independent exhibitor at Earlington, Ky., had been licensing Paramount product through the Indianapolis Exchange at a time when Crescent was not playing Paramount pictures in Madisonville, Ky. Madisonville had a population two or three times as great as that of Earlington, and when Paramount pictures were not played in Madisonville, it was easy for residents of Madisonville to go three or four miles to Earlington and see these pictures in Dozier's theatre. However, Paramount made a contract for the 1935-36 product with Crescent through the Atlanta Exchange and gave Madisonville clearance over Earlington, which meant that the Indianapolis Exchange had to accept much lower rentals from Dozier in Earlington.[8] Howard complained to Reagan, and Reagan wrote Howard on September 24, 1935, as follows:

> "Dear Mr. Howard:
>
> This will acknowledge receipt of your letter of September 20th, regarding Madisonville and Earlington, Kentucky.
>
> If Madisonville were the only town involved in the Sudekum deal I agree with you that they would not be entitled to any protection over Earlington. However, that is not the case. We have finally been successful in closing a deal with the Sudekum Circuit, which we have been unable to sell for a number of years because of an old argument the Theatre Department had with Mr. Sudekum; but since there is much more involved than just Madisonville, the Company is desirous of securing the film rental we have not had for several years from the Sudekum towns, and it was necessary to include in the Madisonville deal the Earlington protection."

[7] R. 1381.

[8] R. 674-675. See Defendants' Exhibit 223, R. 1351.

Reagan did not testify in the case. If he had testified it would have been difficult for him to explain why Madisonville, with its finer and larger theatre, was not entitled to clearance over Dozier's theatre in the much smaller town of Earlington.[9] Certainly Reagan's letter was not competent evidence to that effect. Not only did Reagan not testify as to the truth of his statement, but the letter was obviously not written in furtherance of a conspiracy between Paramount, Reagan and Crescent, established by independent evidence, to restrain, suppress or eliminate Dozier's competition, but rather to appease a subordinate employee.[10]

In Big Business as well as in Government there are officials who, when forced to make decisions, are prone to give reasons which relieve them from responsibility. Reagan's letter to Howard is a good illustration. Howard was evidently irritated that the Indianapolis Exchange had lost revenue when the Atlanta Exchange made a deal with Crescent, and Reagan was evidently desirous of soothing Howard. Letters of this character from one employee of a distributor to another must necessarily be viewed with skepticism, and there is no reason that they should be entitled to greater consideration as evidence of the truth of their contents than other forms of written hearsay.

In Finding 52, there is quoted a report dated September 16, 1936, from a United Artists salesman concerning his negotiations with Cumberland. This quotation is as follows:

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[9]Cf. Agnew's testimony, R. 1320-1322.

[10]Correspondence of this nature was introduced under a stipulation that the letters were written pursuant to their duties by the persons signing them and that they were received by the persons to whom addressed. R. 723-724. There was no stipulation that the facts stated were true or that the opinions stated were justified. See R. 732-733. Clearly these letters did not constitute memoranda or records of "any act, transaction, occurrence or event" made at the time thereof in the regular course of business so as to be admissible under Act of June 20, 1936, c. 640, Sec. 1, (49 Stat. 1561; 28 U. S. C. A., Sec. 695).

"In Rogersville Hill has opened a new theatre and we will have to play with Hill because this is the only spot of his entire fifteen towns where there is any opposition at all, and Hill has demanded that we approve all contracts or none."[11]

The salesman who wrote the letter did not testify. If he had testified he could not possibly have justified the statement that Cumberland (or Hill) operated theatres in fifteen towns. Cumberland never operated theatres in that many towns. Possibly he might have testified as to the truth of the statement that Hill demanded that United Artists approve all contracts or none. The fact remains, however, that Hill himself died before the trial and that the salesman who wrote the letter was not introduced as a witness. Indeed there is no evidence that the salesman himself had ever spoken to Hill. He may have been referring to what someone else told him. Yet this letter is the basis for the conclusion that Cumberland "coerced" United Artists.

One further illustration will suffice. In Findings 81-85[12] it appears that John D. Henry opened a second-run theatre in Union City, Tennessee, where Crescent was operating a first-run theatre. Crescent also had a second-run theatre in the town but the Court House had burned and Crescent's building, known as the Opera House, was being used as a temporary court building. When Henry (who had just sold out to Ruffin Amusements, Inc., a theatre in Hickman, Kentucky, to devote himself entirely to the insurance business)[13] commenced work on his new theatre in Union City, Tennessee (under circumstances which indicated that he was more interested in selling than operating it)[14] Crescent also commenced to remodel a building to use as a second-run theatre.

[11] R. 1384.
[12] R. 1403-1412.
[13] R. 894.
[14] R. 895.

In Findings 81 and 85 reference is made to a letter from a Fox salesman to his Sales Manager stating that Henry's theatre was "one of the most beautiful little theatres I have ever seen in any town". Of course, any statement in this letter as to the character of the theatre was pure hearsay evidence on that subject. What we mainly desire to call attention to, however, is Finding 83 in which it is said that RKO's Memphis Exchange Manager, one Avery, told Henry that he had sold Crescent fifteen pictures of the 1938-1939 product "but that he couldn't sell any of the other pictures to him because he had been advised by Mr. Sudekum's office not to sell those pictures to Henry as Crescent was going to open a theatre in Union City, and would likely want all of them". The District Court in Finding 82 had held that Henry himself was not a credible witness. This statement in Finding 83 must, therefore, have been based on the letter quoted in said Finding dated January 28, 1939, and written by Avery to RKO's Sales Manager. In this letter Avery said, referring to Henry:

> "I would not sell him any of the 1938-39 product as Mr. Sudekum's booker advised that they were putting in a second theatre themselves over there, and would no doubt use our entire 1938-39 product." (Ex. 179).

Avery was introduced as a witness by the plaintiff and testified that he wrote this letter.[15] He was not asked to testify as to the truth of its contents. On cross-examination, however, he testified that if was RKO's practice and custom, where an exhibitor had made a selective deal for a limited number of pictures, to offer that same exhibitor the remaining pictures before offering them to the opposition. Avery further testified that Crescent had contracted definitely for twenty-one pictures (not fifteen) but played not only the twenty-one pictures but an additional eighteen pictures. Avery further testified that although RKO had

[15] R. 801-802.

licensed eighteen pictures to Henry, from the prior season's product, Henry failed to comply with his contract and played only three of the eighteen pictures.[16]

Finding 83 thus appears to be an inaccurate summary of the evidence, leaving the erroneous impression that RKO had conspired with Crescent to withhold product from Henry. This is merely another instance where the District Court relied on the mere fact that a letter had been written instead of relying on the testimony of the person who wrote the letter.

Not all of the Findings contain quotations from these letters and communications, but practically all of the Findings, to the extent that they are against appellants, refer to such documents as the basis for the Findings. There would be very little left in these Findings if the incompetent evidence were eliminated. Hence we think we are entitled to a reversal and dismissal.

2. Method by Which the Findings Against Appellants Were Formulated.

(Assignment of Error 17).[1]

It is well settled that in an equity case, especially where the witnesses testified in open Court, the Findings of the District Court are entitled to a presumption of correctness. The basis of the rule is that the Trial Judge has seen the witnesses testify, observed their manner and demeanor on the witness stand, compared their testimony on direct examination with that on cross-examination, weighed the conflicting testimony where witnesses contradicted each other, and undertaken through the exercise of the judicial process to arrive at the truth. In the case at bar the Findings were filed approximately eighteen months after the conclusion of the trial. The Findings against appellants are, almost without exception, copied *verbatim* from plain-

[16] R. 802-805.

[1] R. 139, 1514-1515.

tiff's brief.[2] In many respects they conflict with Findings in favor of the three distributors, who remained in the case as defendants, with respect to the same situations.[3] Under these circumstances it is respectfully submitted that these Findings are not entitled to a presumption of correctness.

Undoubtedly it is a difficult matter for a District Judge who presides over a Court with a crowded docket to find the time to make an independent analysis of the evidence in a case of this character, where approximately two months were consumed in the trial. No criticism of the District Judge is intended. It is nevertheless submitted that the procedure adopted was seriously prejudicial to appellants. Plaintiff's brief was naturally a partisan document in which plaintiff's able counsel made the most of every point and undertook to draw every possible inference in favor of plaintiff and gainst defendants. It was necessarily argumentative in its discussion of the facts.

There have been many recent reforms in procedure as exemplified in the new Federal Rules of Civil Procedure. We think, however, that the streamlining of judicial procedure has gone too far if Findings of a District Court copied from the brief of one of the parties are to be accorded any verity whatever on appeal. Our views in this connection are supported by *Process Engineers, Inc.* v. *Container Corporation of America*, (C. C. A. 7, 1934) 70 F. (2d), 487, where Circuit Judge Evans, in delivering the opinion of the Court, said (p. 489):

> "It is urged that the court's findings should be sustained because supported by some evidence. The weakness of this argument lies in the fact that the findings were not made by the court, but are the work of industrious counsel who combined his argument and a partisan and unfair statement of facts into one and

[2] R. 1521-1522.

[3] Illustrations will be pointed out in the next succeeding portion of this brief.

called it, 'Findings of Fact'. It is difficult to distinguish these findings from the brief of counsel for appellee.

"Such so-called findings do not help an appellate court. They reflect the views of counsel who submitted them and detract from the force and effect which are ordinarily given to findings made by the trial judge. When the abuse is aggravated (and the objectionable practice is growing), the assistance to the appellate court, which findings when carefully made by the trial court afford, is lost, and it becomes necessary for us to study the evidence as though no findings had been made by the District Court."

We think the language of Circuit Judge Frank in *United States* v. *Forness* (C. C. A. 2, 1942), 125 F. (2d) 928, at pages 942-943, may also be appropriately considered in this connection. The discussion is lengthy and we quote only the following paragraph:

"We stress this matter because of the grave importance of fact-finding. The correct finding, as near as may be, of the facts of a law suit is fully as important as the application of the correct legal rules to the facts as found. An impeccably 'right' legal rule applied to the 'wrong' facts yields a decision which is as faulty as one which results from the application of the 'wrong' legal rule to the 'right' facts. The latter type of error, indeed, can be corrected on appeal. But the former is not subject to such correction unless the appellant overcomes the heavy burden of showing that the findings of fact are 'clearly erroneous.' Chief Justice Hughes once remarked, 'An unscrupulous administrator might be tempted to say "Let me find the facts for the people of my country, and I care little who lays down the general principles.' " That comment should be extended to include facts found without due care as well as unscrupulous fact-finding; for such lack of due care is less likely to reveal itself than lack of scruples, which, we trust, seldom exists. And Chief Justice Hughes' comment is just as applicable to the careless fact-finding of a judge as to that of an administrative officer. The judiciary properly holds admin-

istrative officers to high standards in the discharge of the fact-finding function. The judiciary should at least measure up to the same standards."

IV. ASSIGNMENTS OF ERROR 1-11, INCLUSIVE.

Under this heading we proposed very briefly to discuss certain of the Findings as to which we have specifically assigned error. In each instance, these Findings were copied from plaintiff's brief. The principal purpose of these assignments is to annotate and support the general propositions stated under the preceding subdivision of this brief and to illustrate the prejudicial effect of the consideration by the District Court of incompetent evidence and of the adoption from the Government's brief of the Findings on which the Government now relies to support the decree. No one of these assignments, in and of itself, is determinative of any of the main issues raised on the appeal, viz., the question of the elimination of portions of the decree. Their cumulative effect is, we believe, to demonstrate the utter lack of factual basis for those portions of the decree as to which error has been specifically assigned.[1]

Finding 39—Paris, Tenn.
(Assignment of Error 1).[1]

Promptly after Crescent opened its new theatre in Brownsville, Tennessee, in the summer of 1935, in opposition to Lawing, the latter opened a theatre in Paris, Tennessee, in opposition to Crescent.[2] In Finding 39 it is stated that for his Paris theatre Lawing obtained 1934-35 Paramount product and 1935-36 Fox product and was able to spotbook a few RKO pictures. The Finding then proceeds:

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[1]These assignments of error seeking a revision of the decree are discussed in the next succeeding subdivisions of this brief, commencing at page 96.

[1]R. 1506.

[2]R. 1373.

"He was unable to secure any other major product nor would any of the distributors sell him a second run; the ostensible ground of refusal was that the town was too small for a second run. But the Crescent was allowed to repeat pictures which had played Lawing's theatre in Brownsville, a much smaller town."

While Mr. Lawing did testify on direct examination, in very general terms, that he was unable to secure any other major product for Paris and that none of the distributors would sell him a second run,[3] it is elementary that the cross-examination of a witness must be considered in connection with his direct examination and, if the two are in conflict, no weight can be given to either. On cross-examination Mr. Lawing testified as follows:[4]

"Q. What did the Columbia representative tell you when you made application for second run pictures?

A. They sold me some first run pictures that Mr. Sudekum didn't have under contract up there.

Q. Did they refuse to sell you any second run pictures?

A. I have a very vague memory about that. As a matter of fact, I don't know that I recall definitely about asking for second run Columbia.

Q. Now, which companies did you definitely ask for second run pictures?

A. I believe that would be impossible for me to answer except that I possibly went into all of them and asked them if it would be possible to get second run pictures for Paris and they had all about the same answer; that they either wouldn't care to take a contract or that Paris was too small for second run operation.

Q. You say you possibly did that. Do you mean from your recollection at this time it is possible that back in 1935 you did those things?

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[3] R. 302-303.

[4] R. 328-329.

A. Well, it is customary to call on all the companies and make every reasonable effort to get product for the towns, yes sir.

Q. I say, you are basing your testimony about that on what is possible or what was customary and not on any actual or definite recollection?

A. Well, it would be very vague as far as the definite part of it is concerned."

Finding 39 is, we think, in irreconcilable conflict with the portion of Finding 154[5] relating to Paris, Tennessee, as follows:

"At Paris, Tennessee, Lawing made no application for Universal product and it does not appear that the Crescent Amusement Company contracted for Universal product during the period that it operated in competition with Lawing."

We think it is also in irreconcilable conflict with the statement in Finding 172[6], with respect to United Artists, that:

"He (Lawing) made no effort to procure the 1935-1936 product either at Paris or Brownsville."

Finding 39 illustrates the prejudicial effect to appellants of the District Court's method of formulating the Findings against appellants. Finding 39 was copied from plaintiff's brief.[7] Finding 154 and Finding 172, which were not taken from plaintiff's brief, reflect a different state of facts.

Attention is further called to the fact that while Lawing's Paris theatre was specified by plaintiff in paragraph 1 of one bill of particulars, no particulars as to alleged "distress methods" were ever furnished.[8]

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[5] R. 1462.
[6] R. 1470.
[7] R. 1522.
[8] R. 164.

Findings 44 and 45—Brownsville, Tenn.

(Assignments of Error 2, 3, and 4).[1]

These Findings are in regard to the alleged discrimination by Loew's against Lawing. In Finding 44[2] reference is made to testimony of Loew's New York Sales Manager, Mr. Connors, who testified that one reason for overruling Willingham's recommendation that Lawing's offer be accepted was "that Willingham had advised him that Lawing claimed he could not pay as much for the 1935-1936 product as he had previously been paying" (referring to Willingham's letter of May 28, 1935, which was introduced as Def. Ex. 51),[3] and that Lawing's application called for less money than he felt Loew's product was worth in Brownsville."

Finding 44 then proceeds as follows:

> "... This could not possibly have been Connor's reason for rejecting Lawing's application; however, because, first, there is nothing to show that Connors ever told anyone Lawing's offer was inadequate, and second, Lawing's offer, as a matter of fact, was as good as, if not better than, the deal Loew's accepted from Crescent. Connors further explained, in justification for his decision overruling Willingham's recommendation, that he knew that Lawing's theatre was not as modern as the new Crescent Theatre, and he felt that Metro could get more money from the new theatre. This was also an afterthought, as there is no suggestion in the voluminous correspondence regarding this situation introduced in evidence by both sides that the relative merits of the theatres entered into his decision, nor was there any necessity for Connors to speculate about what he could get from the two theatres because he had both offers before him, and by the simple process of comparing the two offers, he would have ascertained that from the standpoint of Loew's, the Lawing deal was as good as, if not better than, the Crescent offer."

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[1] R. 1507-1508.

[2] R. 1375-1377.

[3] R. 751.

In Finding 45 it is stated:

> "Thus, as far as the disposition of Loew's 1935-36 product in Brownsville, Tennessee, is concerned, the record shows that it was licensed to Crescent although Lawing offered Loew's at least as good a deal as the Crescent deal and was Loew's old customer in Brownsville."

This situation has been discussed heretofore in an earlier portion of this brief and reference is made to said discussion so as to avoid repetition. There is absolutely no basis for the Finding that Connors testified falsely or that his reasons for overruling Willingham's recommendations were not as stated by him. Plaintiff's counsel did not question Connors on cross-examination as to the source of his information regarding the character of Lawing's theater in Brownsville as compared with Crescent's theatre.[4] The evidence as to the revenue obtained by Loew's from Crescent, as compared with the revenue previously obtained from Lawing, and as to the revenue which Loew's might have expected to obtain from Lawing, was in direct conflict with the Findings.[5]

Finding 48—Earlington, Ky.
(Assignment of Error 5).[1]

As explained in an earlier portion of this brief, Crescent did not play Paramount pictures in Madisonville, Kentucky, during the 1933-34 and the 1934-35 seasons. When Dozier played Paramount pictures of these two seasons in Earlington, Kentucky, three or four miles distant, no question of clearance was involved. Crescent licensed the 1935-36 product for Madisonville on August 22, 1935, after Dozier had licensed this product for Earlington in April,

[4] R. 1019-1020.
[5] *Supra*, pp. 57-58.
[1] R. 1508.

1935.[2] At the time Dozier made his contract, Paramount was negotiating with Crescent and necessarily had to consider whether Madisonville would have clearance over Earlington, or Earlington would have clearance over Madisonville. Hence, when Dozier made his contract in April, 1935, there was inserted a provision as follows:

> "Clearance: Subject to final decision of Indianapolis Clearance Board".

This was a Board that had been set up under the authority of the National Industrial Recovery Act, which was declared unconstitutional about thirty days later, and, as stated by plaintiff's counsel at the trial of the case, the Board broke up immediately after the decision.[3]

The plain meaning of this provision of the contract was that the Board would determine whether Earlington was to have clearance over Madisonville, or Madisonville was to have clearance over Earlington, and the length of the clearance. Dozier was permitted to testify, however, that he had an oral agreement with a Paramount salesman, one Newman, that Earlington would have clearance over Madisonville, and that only the length of the clearance would be fixed by the Board.[4] It was undisputed that film salesmen had no authority to make contracts. Dozier's testimony as to his conversation with Newman was plainly incompetent not only for that reason but for the reason that it varied the terms of the written contract.

Crescent's contract with Paramount, executed in August, 1935, (after the Board had broken up) gave Madisonville clearance over Earlington. Paramount then entered into a "superseding contract" with Dozier, reducing the film rentals called for in his agreement of April 3, 1935, by approximately seventy-five per cent. This was fair because when Dozier had to play the pictures after Madison-

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[2] R. 674-675. See Defendants' Exhibit 223, R. 1351.

[3] R. 342-346.

[4] R. 364.

ville, he was catering only to the residents of Earlington and the pictures were less valuable than when he was catering to the residents of both towns.[5]

In Finding 48[6] it is stated:

> "In April 1935, Dozier entered into a contract for Paramount's 1935-36 product which provided that Dozier was to have clearance over Madisonville, but the the length of the clearance was to be decided by the N. R. A. Clearance Board at Indianapolis."

Again, in Finding 48 it is stated that Paramount's contract with Crescent giving Madisonville clearance over Earlington "was in direct conflict with his (Dozier's) agreement with Paramount."

It is submitted that these statements are wholly without support in the record, unless plainly incompetent evidence is to be considered.

Assuming, however, that Paramount violated its contract with Dozier: there was no evidence that Crescent knew of the provision in the contract regarding clearance or in any way induced Paramount to breach the contract. The Finding as to a breach of contract is therefore immaterial and irrelevant. It is nevertheless prejudicial to appellants for the reason that there is no express Finding as to Crescent's lack of complicity.

Attention is further called to the fact that plaintiff's specification of Earlington in its bill of particulars related solely to competition between the theatres at Earlington and not to competition between Dozier's Earlington theatre and Crescent's Madisonville theatre.[7]

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[5] See statement of plaintiff's counsel, R. 345-346. Dozier had advertised the pictures in Madisonville to attract residents of that town to his Earlington theatre. R. 1272.

[6] R. 1379.

[7] R. 155.

Finding 54—Rogersville, Tennessee.

(Assignment of Error 6).[1]

In Finding 54[2] the following language appears:

> "An examination of Miller's application for the Warner 1937-38 product shows that it called for a total guaranteed rental on feature pictures which was $35.00 less than the rental called for by the Cumberland contract. However, it called for 18 pictures at a percentage against a guarantee, and if these pictures had paid anything above the guarantee, the contract would have equaled or exceeded the Cumberland deal."

As heretofore pointed out, this Finding disregards entirely the question of short subjects. A comparison of the film rentals received by Warner Bros. from Miller in 1936-1937 and Cumberland in 1937-1938 was as follows:[3]

	Features	Scores	Shorts	Total
1936-37 Miller	$858.84	$145.00	$184.50	$1188.34
1937-38 Cumberland	975.00	135.00	440.50	1550.50

Finding 59—Huntingdon and McKenzie, Tennessee.

(Assignment of Error 7).[1]

The theatre at McKenzie, Tennessee, in Carroll County, was operated by Moore. Rockwood acquired a theatre in Huntingdon, Tennessee, a neighboring town of slightly less population within the actual corporate limits than McKenzie, but Huntingdon was the County Seat and the McKenzie theatre was very inferior.[2]

The following language appears in Finding 59:[3]

> "The Huntingdon deal for the 1938-39 season was only $37.00 higher than the 1937-38 deal when it did

[1] R. 1508.
[2] R. 1386.
[3] R. 1108.
[1] R. 1509. See requested amendment to the Finding, R. 112.
[2] R. 1226-1228, 1250-1252.
[3] R. 1388-1389.

not have clearance over McKenzie, and this increase was not in payment for the switch in runs because it represented the identical season-to-season increase called for by the franchise in other Rockwood situations where no change in clearance was involved. Insofar as Huntingdon and McKenzie are concerned, Paramount lost money by switching the runs.[4] Why then did the change occur? This is answered by Morgan's letter to Unger, Paramount's southern division sales manager, on August 6, 1938, in which he said:

> 'With further reference to your letter of July 28, regarding the letter that Mr. Y. D. Moore, of McKenzie, Tennessee, wrote to Mr. Agnew. I have discussed the matter several times with Mr. Sudekum, and he insists that Huntingdon have protection over McKenzie.'[5][6]

This is another illustration of the manner in which Findings were based on incompetent evidence rather than on competent evidence.[6] It is to be assumed that Rockwood insisted that Huntingdon have protection over McKenzie. It is likewise to be assumed that Moore insisted that McKenzie have protection over Huntingdon. The question for Paramount to decide was how to get the greatest aggregate revenue from the two towns over the five year period covered by the franchise,—whether by giving McKenzie clearance over Huntingdon or vice versa.[7] Rockwood agreed to play the four top Paramount pictures on a percentage of gross receipts and undoubtedly the gross re-

[4] This is pure speculation. Rockwood may have paid too much for the 1937-1938 product, treating that season separately, and may have agreed to the franchise terms for Huntingdon for the full five year period only on condition that Huntingdon was to have clearance over McKenzie commencing with the 1938-1939 season.

[5] R. 655.

[6] Plaintiff's counsel merely asked Morgan if he wrote the letter in the course of his duties as Southern District Manager of Paramount. R. 650. Morgan was not asked and Sudekum was not asked about the *facts* of the matter.

[7] R. 1319, 1330.

ceipts would have been substantially decreased by giving McKenzie clearance over Huntingdon.[8]

Attention is further called to the fact that plaintiff's specification of McKenzie in its bill of particulars related solely to an alleged threat of competition in McKenzie and not to competition between Moore's theatre in McKenzie and Rockwood's theatre in Huntingdon.[9]

Finding 63—Hopkinsville, Ky.

(Assignment of Error 8).[1]

In Hopkinsville, Kentucky, a theatre in opposition to Crescent's theatres was opened by Anderson, former manager of one of Crescent's Hopkinsville theatres. On October 12, 1937, Anderson wired Paramount asking whether its second-run product was available and Paramount's Atlanta Manager replied on October 14, 1937, that they were unable to offer second-run service to him. Previously on October 11, 1937, a Paramount salesman, one Lowe, had advised Anderson that Paramount had made a deal with Crescent for its circuit.[2] After stating these facts, Finding 63[3] proceeds as follows:

> "The deal with Sudekum referred to by Lowe, was the franchise dated July 28, 1938, as of November 1, 1937. Clause 8(e) of that franchise gave Crescent the option of playing an additional or repeat-run on any picture it played first-run in Hopkinsville and all of the other towns outside Nashville where a first run was licensed. By this option Crescent was able to prevent Anderson from obtaining any second-run feature although it made no commitment to use them itself."

Lowe was not introduced as a witness, and there was no evidence whatever to support the above statements. It is

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[8]Exhibit P-29.

[9]R. 157.

[1]R. 1509.

[2]R. 621.

[3]R. 1392.

true that Crescent and Paramount had agreed in principle on a five-year franchise, but the details had not been worked out and the agreement was not actually executed until July 28, 1938 "as of November 1, 1937".[4] Lowe's communication to Anderson was on October 11, 1937. Certainly Lowe, a salesman, did not know then that the franchise as ultimately drafted would contain clause 8(e).[5] This clause will be more fully discussed in a later portion of this brief. Suffice it to say here that there was no evidence that Paramount's unwillingness to negotiate with Anderson for second-run product in Hopkinsville was dependent upon clause 8(e) of the franchise;[6] and the language "Crescent was able to prevent Anderson from obtaining any second-run feature" is wholly unwarranted because there was no evidence that Crescent even knew that Anderson wanted to negotiate for it.

Finding 70—Morristown, Tenn.
(Assignment of Error 9).[1]

Tim Smith of Peerless Enterprises, Inc., opened a theatre on March 26, 1937, in Morristown, Tennessee, where Crescent was operating a theatre. In February, 1938, Smith asked Paramount to permit him to play in his Morristown theatre six pictures which he had contracted to play in a theatre which Smith operated at Fountain City, Tennessee. He received a reply signed by A. H. Duren, booking agent of Paramount, saying: "we will be unable to do this, since our service has been sold to another exhibitor in Morristown for both first and subsequent runs".[2] Duren was not in-

[4]Exhibit P-29.

[5]The negotiations as to the franchise were not closed until December 21, 1937. R. 679.

[6]See Defendants' Exhibit 224, R. 1351, as to revenue received by Paramount from Crescent in 1937-1938 as compared with revenue received from Anderson in 1936-1937.

[1]R. 1509.

[2]R. 531.

troduced as a witness and the introduction of this letter by Smith proved nothing except the fact that Smith received the letter and that Paramount refused to permit him to transfer the pictures.

In Finding 70[3] it is said (referring to the five-year franchise):

> "... One reason Smith was advised that Paramount pictures were not available to him second-run was because of the repeat-run option in the same franchise. This is clearly indicated by the following portion of Morgan's letter to Unger of November 11, 1938, which was in response to a letter from Unger to Morgan, written after Smith had complained to the Department of Justice, directing Morgan to make some pictures available for Smith (Ex. 152):[4]
>
> Now as regards the last paragraph of your letter about second runs, following shows the population of each town:
>
> | | |
> |---|---|
> | Morristown | 5,875 |
> | Harriman | 5,000 |
> | Newport | 2,753 |
>
> In any event, the only way we could sell second run, even if we wanted to in these particular towns, would be after Sudekum had taken the refusal, because Paragraph E of article 8, of the Crescent Amusement Company franchise, provides he can repeat any feature at a certain given price."

As we see it, Morgan's letter indicates that he was undertaking to give a reason which had not previously entered into the matter at all. Morgan's letter was written nine months after Paramount's booking agent had refused to permit Smith to transfer the pictures from Fountain City to Morristown. This letter from Morgan, a Paramount employee, to his immediate superior was certainly not written in furtherance of a conspiracy between Paramount

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[3] R. 1397.

[4] R. 651-656.

and Crescent to eliminate Tim Smith's competition at Morristown, Tennessee. Not only was Morgan's letter written about a past event, but Morgan was not the man who had refused to permit Smith to transfer the pictures. In his letter Morgan erroneously assumed that Smith had tried to license these pictures for Morristown, while as a matter of fact he had already licensed them for Fountain City and was trying to get out of his agreement. In his testimony Morgan went into the hypothetical situation which would have existed if Smith had attempted actually to license these pictures for Morristown.[5]

Morgan also mentioned Harriman, Tenn., and Newport, Tenn., in his letter of November 11, 1938. Crescent had both a first-run theatre and a second-run theatre in Harriman, Tennessee, when Smith opened up his opposition theatre. The Court makes no Finding of discrimination as to Harriman or Newport (the theatre at Newport was operated by Newport Amusements, Inc. which was not made a defendant) and it is unnecessary to discuss these situations.

Finding 81—Union City, Tennessee.

(Assignment of Error 10).[1]

When John D. Henry opened his theatre in Union City in opposition to Crescent (under circumstances which clearly indicated that Henry was simply trying to create and cash in on a nuisance value),[2] Crescent's second-run theatre in

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[5]R. 694-696, 1038-1039.

[1]R. 1510.

[2]R. 893-895. Henry had operated the only theatre at Hickman, Kentucky, and had solicited the interest of Ruffin Amusements, Inc., toward its purchase for the purpose (as he represented) of getting out of the threatre business. Ruffin Amusements, Inc. bought the theatre, and immediately after he made the sale Henry began to make arrangements to open a theatre at Union City to compete with Crescent. Henry was engaged in the loan and insurance business and had found a way of picking up some extra money.

the town, known as the Opera House, was being used for a temporary court house while a new court house was under construction. About a week before Henry opened his second-run theatre, Crescent opened a new second-run theatre known as the "Ritz". There was no evidence that Crescent intended to operate both the Ritz and the Opera House at the same time, but Crescent necessarily had the option to operate its second-run theatre in the Opera House instead of the Ritz when the new court house was finished. Paramount amended the franchise by providing that the pictures contracted to be played in Union City might be played at either the Capitol (the first-run house), Ritz or Opera House.

In Finding 81[3] it is said:

> "... The negotiation and execution of the rider at this time showed that Crescent intended if necessary to eliminate Henry, to operate all three theatres, and Paramount was willing to cooperate."

This is merely an inference improperly drawn from the admitted fact that the rider was executed. Under well settled principles as to burden of proof, defendants were entitled to the presumption that the rider was executed in the ordinary course of business and for a bona fide purpose, because this inference was at least equally permissible. There was no other evidence that Crescent or Paramount had any understanding such as that suggested in Finding 81 which was, as in the case of the other Findings referred to in these assignments of error, copied from plaintiff's brief.[4]

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[3]R. 1403.
[4]R. 1522.

Finding 100—Gadsden, Ala.
(Assignment of Error 11).[1]

Crescent operated three theatres in Gadsden, Alabama, all located in the down-town business district, and one theatre in Alabama City, which was formerly a separate municipality but had been annexed to Gadsden. Crescent and the distributors, however, had continued to treat Alabama City as a separate town, for the purpose of film deals, instead of as a part of Gadsden. In other words, film deals made by Crescent specified Alabama City and Gadsden as separate towns.[2] After the present suit was filed, a suburban or "neighborhood" theatre was built in East Gadsden, a suburb on the opposite side of downtown Gadsden from Alabama City, and opened in September, 1939.[3] This theatre, known as the Dixie, had several successive managers. Two of them, Currey and Bailey, testified in the case.

In Finding 100[4] it is said:

> "Curry didn't attempt to negotiate with Paramount 'because it was well understood that the Crescent Amusement Company had a first-run franchise and second run option'. The franchise provides both a first run in Gadsden and a first run in Alabama City with a repeat-run option."

It is true that Curry, who was manager for about seven weeks in July and August, 1940,[5] testified on direct examination that he didn't try to negotiate with Paramount for second-run product "because it was well understood that the Crescent Amusement Company had a first run franchise and a second run option, so I didn't even have the heart to go to see them".[6] Actually the Dixie Theatre, in July and

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[1] R. 1510.
[2] R. 1421, second paragraph of Finding 94; see also R. 850-852.
[3] R. 454-456.
[4] R. 1424-1425.
[5] R. 462.
[6] R. 472.

August, 1940, when Curry was its manager, already had a contract with Paramount, made by one of Curry's predecessors, covering specified pictures of the 1938-39 product and designated "second run Gadsden";[7] and at this same time Crescent had a definite second-run contract (not an option) containing a definite commitment for twenty photoplays of the 1939-40 product, with only thirty days after first-run playdate to notify Paramount of its intention to use any picture for second-run in one of its three down-town Gadsden theatres.[8] The Dixie Theatre thus had full opportunity to license the rejected second-run pictures of the current product, (in addition to making an ordinary third-run deal), and could always know, within thirty days after first-run exhibition in Gadsden, whether a particular picture was available for second-run exhibition. The pictures selected by Crescent had to be played at the rate of two per month, as available,[9] so that the Dixie Theatre was not prejudiced if it desired to play these pictures on third-run. It must always be kept in mind that the Dixie Theatre was a suburban or "neighborhood" house of the type which normally plays pictures after the down-town theatres have played them.

In Finding 100[10] it is further stated:

> "Fox, Loew, Paramount, United Artists, and Warner all held the Dixie back of the Ritz, although there was no clearance provision in their contracts with the Ritz which would require them to do so. Their uniformily in holding a superior theatre behind an inferior one may only be explained by the pressure which Sudekum was able to exert on each of these distributors."

The Ritz was Crescent's Alabama City theatre, which had been in operation for many years. The availability of prod-

[7] Defendants' Exhibit 227; see also R. 1080-1081.
[8] Defendants' Exhibit 228.
[9] Defendants' Exhibit 228.
[10] R. 1425.

uct for exhibition in the Ritz had been long established, and was not changed when the Dixie Theatre was opened. The two theatres were on opposite sides of down-town Gadsden, —about five miles apart,—and were not competitive in any substantial way.[11] It is to be assumed that the film rentals paid by the Dixie Theatre were substantially lower than the film rentals paid by Crescent for the Ritz, in view of the fact that the Ritz played the pictures earlier. However, there was not the slightest evidence that Crescent had any agreement with any of the distributors as to play dates for the Dixie Theatre. There was positive testimony to the contrary.[12] Crescent had no control whatever over the distributors as to how they made their product available. So far as United Artists is concerned, the above quoted language from Finding 100 is at variance with Finding 99,[13] which is to the effect that after the Dixie Theatre was opened, United Artists merely continued its established custom of setting up the Ritz Theatre at Alabama City as a first-run situation for the Alabama City area. There was not the slightest evidence of any "pressure" exerted by Sudekum on the distributors with reference to their deals with the Dixie Theatre; and the language in Finding 100 is another illustration of unwarranted deductions from the evidence.[14]

V. PARAGRAPHS (8) AND (12) OF THE DECREE. (Assignment of Error 21).

For the convenience of the Court paragraphs (8) and (12) of the decree are copied below:

"(8) That each of the defendants, the Crescent Amusement Company, Muscle Shoals Theatres, Rock-

[11] R. 456-457.

[12] R. 1209-1210.

[13] R. 1424.

[14] That the Dixie Theatre suffered from no shortage of films is evidenced by the fact that it didn't play Fox pictures which it contracted to play. R. 1138, 1157.

wood Amusements, Inc., Cumberland Amusement Company, and Cherokee Amusements, Inc., be, and it hereby is, enjoined and restrained from combining its closed towns with its competitive situations, in licensing films for the purpose and with the effect of compelling the major distributors to license films on a non-competitive basis in competitive situations, and to discriminate against its independent competitors in licensing films.

"(12) That each exhibitor defendant be, and hereby is, enjoined and restrained from conditioning the licensing of films in any competitive situation outside Nashville, Tennessee, upon the licensing of films in any other theatre situation."

Certain similarities and certain differences will appear from a comparison of these two paragraphs in the decree, both designed to prevent appellants from exercising leverage against the distributors.

We have heretofore discussed the theory of "coercion" on which these paragraphs and other paragraphs of the decree are based. We now propose to discuss briefly the effect which these provisions of the decree will necessarily have.

Let us assume that the circuit has been doing business for many years with RKO, making circuit deals each season. Let us assume that when this decree becomes effective independent opposition opens in one of the towns in the circuit,—perhaps a Tim Smith or John D. Henry. RKO then says to the circuit: "We will not negotiate with you for pictures in your new competitive situation unless you agree to such and such prices and terms for the remainder of the circuit." The circuit must accede to these prices and terms for the rest of the circuit before it can even negotiate with RKO in the competitive situation. RKO has already had the business of the circuit and will not get additional business by these means but would get better terms and greater revenue.

It must be borne in mind that in non-competitive or "closed" situations the exhibitor can ordinarily take ad-

vantage of competition among the distributors for the exhibitor's business. In competitive situations, on the other hand, the distributors can take advantage of the competition between the exhibitors for pictures, playing position, etc. Paragraphs (8) and (12) of the decree take away from the exhibitors the former advantages they enjoyed and give the distributors advantages which they did not enjoy. If it were not for the decree, the circuit could say to RKO in the hypothetical case above described: "We will accede to your prices and terms for the remainder of the circuit only if you agree to corresponding prices and terms in the town where we have competition."

Plaintiff's theory in the case at bar disregards entirely the question of film rentals and terms in film deals. It assumes that prices and terms are standardized and that the only question is whether the distributor will furnish the pictures to the circuit or the independent. This is a wholly unrealistic and fallacious viewpoint which, we think, underlies the entire decree.

It is difficult to see how these paragraphs of the decree will be of much help to independent exhibitors. Certainly the price of pictures will not be reduced. If the theory of the Government is that an independent exhibitor should have the opportunity of bidding against the circuit for pictures, playing position, etc., the distributors should have remained in the case as defendants. If they had been found guilty, it would have been possible for an injunction to issue which would restrain them from licensing films in a competitive situation except upon a strictly competitive basis. The present decree, which operates upon the circuit rather than upon the distributors, is ineffective to reach the desired result and can have no possible effect except to aggrandize the distributors at the expense of the exhibitors.

Aside from the economic aspects, and viewing the question as one of ordinary equity practice, the injunction against the defendant exhibitors was improper because the distributors were necessary or indispensable parties. The

Big Five were deliberately and voluntarily dismissed as defendants after having originally been made parties, and no injunction was issued against United Artists, the only defendant distributor found guilty.

In Pomeroy's Equity Jurisprudence, Fifth Edition, Sec. 114, it is said that a fundamental principle concerning parties is that "all persons who are so interested, although indirectly, in the subject-matter and the relief granted, that their rights or duties might be affected by the decree, although no substantial recovery can be obtained either for or against them, shall be made parties to the suit: . . . The primary object is, that all persons sufficiently interested may be before the court, so that the relief may be properly adjusted among those entitled, the liabilities properly apportioned, and the incidental or consequential claims or interests of all may be fixed, and all may be bound in respect thereto by the single decree."

In support of the text the author cites cases decided by this Court, including *Niles-Bement-Pond Company* v. *Iron Moulders Union* (1920), 254 U. S. 77, in which the Court said:

> "There is no prescribed formula for determining in every case where a person or corporation is an indispensable party or not, but a rule early announced and often applied by this court is sharply applicable to the case at bar. In *Shields* v. *Barrow*, 17 How. 130, 139, this language,—quoted with approval in *Barney* v. *Baltimore City*, 6 Wall. 280, 284, and again in *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S. 33, 48,—was used to describe parties so indispensable that a court of equity will not proceed to final decision without them, viz:
>
> "'Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.'"

In the later case of *Commonwealth Trust Company of Pittsburgh v. Smith et al*, (1924), 266 U. S. 152, suit had been brought by a trustee for bondholders to foreclose the lien on the land and water rights of two settlers under a reclamation project. The defendants urged that the bill should be dismissed because all the settlers under the particular project had not been made defendants. The District Court dismissed the bill because of the refusal to bring in the additional parties and this Court affirmed, quoting with approval the language of the District Judge as follows:

> "In a very substantial sense all the settlers are parties to one general contract, in the subject matter of which all are interested and by virtue of which all have rights so interdependent, whether they be regarded as joint or several, that the interest of one cannot be defined and adjudicated without affecting the interests of all others."

Our best authority in the case at bar for the theory that the distributors were necessary parties is the Anti-Trust Division itself. When the complaint was filed there were eight defendant distributors and paragraph 4 of the prayer for relief read as follows:

> "4. That the defendant *distributors* herein, and each and all of their respective officers and directors, and each and all of their respective servants, agents, and employees, and all persons acting or claiming to act on behalf of said defendants or any of them, be perpetually enjoined and restrained from licensing feature pictures for exhibition on any run at any theatre in any of the Crescent towns, except upon a local competitive basis whereby all theatres operating in each of said towns will have an equal opportunity to license pictures for that area without regard to whether these theatres or any of them form or constitute a part of a circuit of theatres." (Italics ours).

There was not in the original complaint, and there was never added by amendment, a prayer that the defendant

exhibitors be enjoined as now provided in paragraphs (8) and (12) of the decree. The draftsman of the complaint recognized that any injunction of this character should operate against the distributors,—not against the exhibitors. This is simply another illustration of the manner in which the theory of the suit was changed in midstream and of the manner in which the decree was based on a theory not embodied in the complaint. We repeat that United Artists was found guilty but *was not included* in the injunctive relief contained in these two paragraphs of the decree.

Passing now from questions of economics and questions of practice, it is next submitted that these paragraphs of the decree cannot be sustained under the interpretation given the Sherman Act by this Court in *Apex Hosiery Co. v. Leader* (1940), 310 U. S. 469, 84 L. ed. 1311. Discriminations by sellers as between different purchasers were not regarded as "restraints of trade" at common law. That Congress did not intend the Sherman Act to prohibit such discriminations is indicated by the fact that it enacted the Clayton Act and the Robinson-Patman Act (Title 15, U. S. C. A. Sections 12, et seq.) Except in the case of public utilities, there has never been a legislative rule which undertakes to put every purchaser on exactly the same footing with respect to any service or commodity. The liberty of trade would be greatly impaired if, for example, a milliner could not save an especially attractive hat for a good customer, or even a prospective customer, and decline to sell it to someone else in her own absolute discretion.

In *United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707, decided April 10, 1944, this Court said:

> "Congress has been liberal in enacting remedies to enforce the anti-monopoly statutes. But in no instance has it indicated an intention to interfere with ordinary commercial practices. In a business, such as Soft-Lite, which deals in a specialty of a luxury or near-luxury character, the right to select its customers may well be the most essential factor in the maintenance of the highest standards of service. We are, as the District

Court apparently was loath to deny to Soft-Lite this privilege of selection."

As previously suggested, it is the theory of the portion of the decree now under discussion that, in localities where there are competing theatres, motion picture films should be licensed on the basis of competitive bidding. Certainly the distributors could have no objections because competitive bidding raises prices. But it is a novel view of the Sherman Act whereby it becomes the medium to enforce, by judicial decree, a trade practice which raises prices instead of lowering them. In *Apex Hosiery Co.* v. *Leader*, *supra*, this Court interpreted the Sherman Act as designed to prevent practices which "deprive purchasers or consumers of the advantages which they derive from free competition." Here the attempt is made to establish free competition among purchasers for the advantage of the sellers. The interests of the theatre-going public are not considered.

We do not contend, and it is unnecessary in this case for the Court to consider the question, that the Sherman Act may not under some circumstances be invoked by sellers against combinations of purchasers. Indeed the Government has in recent years invoked the Sherman Act for such purposes, but always in favor of sellers of perishable goods, such as livestock, which must be sold promptly and through local markets.[1] This is the first time that the Sherman Act has been invoked, so far as we know, to protect sellers of the products of industry from an alleged "combination" of purchasers on the ground that the combination is able to procure lower prices and more favorable terms than can be procured by individual purchasers. The fact that the emphasis is on the supposed discrimination against the

[1] *United States* v. *St. Joseph Stock Yards* (D. C. W. D. Mo. 1942), 44 F. Supp. 31; *United States* v. *Swift & Co. et al* (D. C. Colo. 1942) 46 F. Supp. 848 (appeal dismissed 318 U. S. 442); *United States* v. *Swift & Co. et al* (D. C. Colo. 1943), 52 F. Supp. 476.

individual purchaser who is in competition with the combination cannot conceal the actual economic philosophy behind this portion of the decree. An individual exhibitor, of course, is always free to join one of the cooperative associations of theatre operators which bargain for pictures through a common purchasing agent.

It is to the pecuniary interest of any distributor to have two competitive theatres bidding for its product in any town rather than a local monopoly, provided the two theatres are comparable in size, equipment, appointments, etc., for the reason that film rentals rise with competition. In the case of *Interstate Circuit* v. *U. S.*, 306 U. S., 208, it was to the pecuniary interest of the distributors to be coerced. In the case at bar, however, we have just the opposite in that it is not to the pecuniary interest of the distributors to suppress individually operated theatres. The proof shows that the distributors always desire competition among exhibitors, provided that it is of a substantial and bona fide character.

There is no proof in this case that any of the eight distributors is so weak as not to be able to resist coercion from the defendant exhibitors. The evidence is to the contrary. The undisputed evidence is that the distributors prefer to lose the business of the defendant exhibitors for one or more seasons rather than to establish precedents which would be hard to overcome in succeeding years. They prefer to take a temporary loss in revenue rather than to depart from their established business practices in order to obtain this revenue.[2] The uncontradicted proof is that the distributors each year call for higher film rentals than in the preceding year. The exhibitors always endeavor to buy the product at the lowest possible price, and rather than establish a low basis the distributors have oftentimes refused to sell the product to the defendant exhibitors for one or more seasons.

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[2]R. 1024-1025.

No instance was shown in the proof in which any distributor "sold away" from an established independent account except where the immediate or potential revenue from the new account was substantially greater. Where the established account has been unsatisfactory or where the new theatre is substantially larger and better, the potential revenue is likewise substantially greater. It is to the interest of a producer to have its pictures shown in the best theatre in the town. The plaintiff did not prove a single instance in which any distributor has "sold away" from an established account in favor of a theatre which was not substantially larger and better. The proof revealed several instances, however, in which the distributor remained with an established account whose theatre was substantially smaller and inferior to the new competing chain theatre.

We do not dispute the proposition that competition among exhibitors for the patronage of the public is in the public interest; but we think it is even more in the public interest to have motion pictures exhibited by exhibitors who are independent of affiliation with the producers and distributors of the pictures and who have the power to bargain with the distributors, on a fairly equal footing, with respect to the film rentals and terms on which the pictures are to be exhibited. It is this power to bargain,—referred to in the complaint as "circuit buying power",—which the Government seeks to destroy. To have a bargaining position that is worth anything, an exhibitor (or association of exhibitors) must have a sufficient number of theatres so that the revenue to the distributor is worthwhile; otherwise, the distributor,—backed by great resources and indifferent to the fate of the exhibitor,—may name a film rental for a group of pictures and say "take it or leave it".

The public has the right to have motion pictures shown in decent theatres and at reasonable admission prices, and an exhibitor who constantly pays exorbitant film rentals cannot give this service. It must be borne in mind that

the business of exhibiting motion pictures is, by its very nature, competitive with other forms of amusement,[3] and that it is to the selfish interest of the operator of a motion picture theatre to give the public a good value for its admission dollar so that theatre-goers will not turn to other forms of amusement. An exhibitor cannot give this value to the theatre-going public if the distributors are given greater advantage than they now have in their bargaining positions with exhibitors, such as these appellants, who are not affiliated with them. "Circuit buying power" is, we think, in the public interest rather than contrary to the public interest.

Assuming the existence of the facts sought to be established by the Government, can it be said that anything has been proved except the proposition that the defendant exhibitors have bargained and traded with the distributors to the best of their ability in the interest of their own business? A buying combination may be of such a character that it unreasonably restrains commerce among the states, but this would only be true in the case of great disparity between the economic positions of the sellers and of the buying monopoly. For example, it may be argued that if the larger tobacco companies were found to engage in concerted buying of tobacco from the many hundreds of individual tobacco growers in the tobacco growing sections of the country, a violation of Section 1 of the Sherman Act would be spelled out. In the Case at bar, the opposite situation exists. Here we have eight large producing and distributing companies. The position in the industry of each of these companies is far more powerful than that of the alleged combination of buyers attacked by the Government.

In any Sherman Act case the conditions in the particular industry constitute an important consideration in gauging the effect on the competitive conditions in the industry of the activities complained of. Thus, in *Appalachian Coals* v.

[3] R. 896, 1192-1193.

United States (1933), 288 U. S., 344, conditions in the coal industry were found to have been such that the public interest was not prejudiced by a combination of coal producers controlling about 73 percent of the commercial production of coal in the Appalachian territory. The Court said:

> "The argument that integration may be considered a normal expansion of business, while a combination of independent producers in a common selling agency should be treated as abnormal—that one is a legitimate enterprise and the other is not—makes but an artificial distinction. The Anti-Trust Act aims at substance. Nothing in theory or experience indicates that the selection of a common selling agency to represent a number of producers should be deemed to be more abnormal than the formation of a huge corporation bringing various independent units into one ownership. Either may be prompted by business exigencies and the statute gives to neither a special privilege. The question in either case is whether there is an unreasonable restraint of trade or an attempt to monopolize. If there is, the combination cannot escape because it has chosen corporate form, and, if there is not, it is not to be condemned because of the absence of corporation integration. As we stated at the outset, the question under the Act is not simply whether the parties have restrained competition between themselves but as to the nature and effect of that restraint.
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> "The fact that the suit is brought under the Sherman Act does not change the principles which govern the granting of equitable relief. There must be a 'definite factual showing of illegality.' *Standard Oil Company v. United States*, 283 U. S. 179. . . ."

The paradoxical nature of the decree in this case may perhaps be demonstrated by a *reductio ad absurdum* argument. If the so-called circuit buying power of a group of exhibitors is injurious to their competitors, it is injurious because the group which exercises the circuit buying power gets more favorable terms from the distributors than indi-

vidual exhibitors are able to obtain.[4] Assuming that the exercise of circuit buying power is illegal, it seems obvious that the distributors suffer damage equally with the independent exhibitors. That being true, if this decree is affirmed they will have causes of action against defendant exhibitors for treble damages under Sections 5 and 6 of the Clayton Act. Surely this cannot be a proper application of the law.

VI. DIVESTITURE—PARAGRAPHS (13), (15), (16) AND (18) OF THE DECREE.

(Assignments of Error 22, 23, 24 and 25).

These Assignments of Error are by far the most important in the case from the standpoint of defendant exhibitors. The divestiture provisions of the decree are harsh and punitive. They not only go far beyond the criterion of "effective relief", but are confiscatory to an extent probably not realized by the District Court.

In discussing these provisions of the decree we first wish to emphasize the fallacies which we think are inherent in the conclusions of law which were urged by plaintiff's counsel and accepted by the District Court.

1. *The fallacious basis for the divestiture provisions:*

The divestiture provisions of the decree were undoubtedly based upon the District Court's Conclusion 9, which was as follows:

> "9. Each of the defendants, Crescent Amusement Company, Inc., Muscle Shoals Theatres, Rockwood

[4] On the trial of the case plaintiff undertook to prove that when an independent exhibitor became affiliated with one of the defendant exhibitors, he was able to procure pictures for lower film rentals. The Court commented as follows: (R. 879) "Well, I think that it is an important part of the Government's case if they can show that the Sudekum circuit was able to secure rebates or lower prices from the distributors than their competitors were able to secure and that theatres which became affiliated with the Sudekum circuit were able to secure concessions and lower prices on their films then they were able to secure before they became affiliated."

Amusements, Inc., Cumberland Amusement Company and Cherokee Amusements, Inc., has violated the Sherman Act in the following manner:

> A. Creating and maintaining an unreasonable monopoly of the business of operating theatres in the towns of Tennessee, Northern Alabama, and Central and Western Kentucky, in which each has theatres.
>
> B. Combining its closed towns with its competitive situations in licensing films for the purpose and with the effect of compelling the major distributors to license films on a non-competitive basis in competitive situations and to discriminate against its independent competitors in licensing films.
>
> C. Coercing or attempting to coerce independent operators into selling out to it, or to abandon plans to compete with it by predatory practice."

The language in paragraph A, "creating and maintaining an unreasonable monopoly", suggests that the District Court construed Section 2 of the Sherman Act as a prohibition against the creation and maintenance of a monopoly even though there were no acts coming within the definition of "monopolize" or "attempt to monopolize".[1] Admittedly, the defendant exhibitors had numerous individual monopolies in the same sense that so-called independent exhibitors had monopolies in towns where there was no competition. In the article on "Monopoly" in the Encyclopedia Britannica, it is said:

> "Examples of monopolies are numerous. The village shop is a 'monopoly' when there is no rival shop in the neighborhood. . . . A monopoly may be due to the sheer excellence of the services rendered by particular concerns."

It is true that appellants operated theatres throughout the State of Tennessee and in the adjacent portions of neigh-

[1] See *Standard Oil Company v. United States* (1911) 221 U. S. 1; *William Goldman Theatres, Inc. v. Loew's, Inc. et al*, (D. C. E. D. Pa. 1944), 54 F. Supp. 1011.

boring states. Clearly this fact does not change the application of Section 2 of the Sherman Act. Geographical concentration of theatres is immaterial, because so-called "circuit buying power" depends on the number of theatres and the other resources of the exhibitor or group of exhibitors, and not on the location of the theatres. Nor does "circuit buying power" depend on the number of corporations in the "combination". One hundred individually-owned theatres in a cooperative association should have as much bargaining power,—other things being equal,—as ten affiliated corporations which own ten theatres each, or one corporation owning one hundred theatres.[2] We think the divestiture provisions of the decree may have resulted from a failure on the part of the District Court to consider the foregoing facts and principles.

Paragraph B of Conclusion 9 has already been discussed in connection with the assignments of error directed to paragraphs (8) and (12) of the decree. That discussion is equally applicable here.

With reference to Paragraph C, an examination of the Findings fails to disclose what the District Court intended by the language employed, but leads to the conclusion that the District Court regarded competition *per se* as "coercion" and as a "predatory practice" where an independent exhibitor had a theatre monopoly in a town and one of the defendant exhibitors thereafter erected a theatre or made plans to erect a theatre in that town.

The only predatory practice alleged in the complaint (after the elimination of a portion of paragraph 54 by order of the Court) was the allegation in paragraph 54 to the effect that independent exhibitors were induced to sell out by threats that they would be deprived of films. There was no allegation in the complaint that the threat of competition

[2] See *Mid-West Theatres Co. v. Co-Operative Theatres*, (D. C. E. D. Mich. 1941); 43 F. Supp. 216

per se, or that actual competition *per se*, amounted to a predatory practice. There is no Finding that any independent exhibitor sold out to any defendant exhibitor as the result of a threat to deprive the independent of films.

The Findings refer to a number of instances where a subordinate employee of Crescent, Mr. Castleberry, (who did not occupy a responsible position and had no knowledge of Crescent's film deals),[3] talked with independent exhibitors in several towns, asked them whether they wanted to sell to Crescent, and said or implied that, if they did not sell, Crescent would open a theatre in competition. None of the exhibitors referred to in these Findings did sell to Crescent and apparently they were not frightened by Castleberry's talk.[4] We regard these Findings as irrelevant, especially in view of the fact that there was no allegation in the complaint upon which the reception of this evidence could properly have been based. There was no allegation as to unsuccessful "threats".[5]

We are not attempting to justify Mr. Castleberry's conversations with independent exhibitors. There was no evidence that any responsible officer of any of appellants knew about these conversations until the trial of this case. We insist, however, that the Findings in that connection do not justify the divestiture provisions of the decree.

In the instances where a defendant exhibitor actually acquired the theatre of a competitor, it uniformly appeared that the competitor preferred to sell rather than attempt to compete with a competently managed theatre and that the seller was paid a fair price. We insist that no predatory practices, in the proper sense of the term, were involved in these instances. An analysis of the Findings will demonstrate that this is true. We think the District Court

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[3] R. 966-967.

[4] Findings 102, 104, 105, 107, 108, R. 1425-1427.

[5] See par. 54 of the complaint, R. 9-10.

failed to distinguish between fair competition and unfair competition.[6]

In *Brown Chemical Company* v. *Meyer*, (1891), 139 U. S. 540, 35 L. ed. 247, this Court said (139 U. S., p. 544):

> "The law does not visit with its reprobation a fair competition in trade; its tendency is rather to discourage monopolies, except where protected by state, and to build up new enterprises from which the public is likely to derive a benefit. If one person can by superior energy, by more extensive advertising, by selling a better or more attractive article, outbid another in popular favor, he has a perfect right to do so, nor is this right impaired by an open declaration of his intention to compete with the other in the market."

In *Sinclair Refining Company* v. *Federal Trade Commission*, (C. C. A. 7, 1921), 276 Fed. 686, (aff'd. 261 U. S. 463), Judge Page said:

> "Competition is not an unmixed good. It is a battle for something that only one can get; one competitor must necessarily lose. The weapons in competition are various. Superior energy, more extensive advertising, better articles, better terms as to time of delivery, place of delivery, time of credit, interest or no interest, freights, methods of packing, lower prices, more attractive and more convenient packages, superior service, and many others, are and always have been considered proper weapons. Expense attending the use of any weapon, the foolishness of it, the fact that a method is uneconomical, or that the competitor cannot meet any method or scheme of competition because it will be ruinous to him to do so, have not, nor has either of them, ever been held unfair. Such things are a part of the strife inherent in competition."

[6] An illustration is Finding 103, R. 1426, which should be compared with the evidence on which it was presumably based, R. 284-285, 296. The independent, Pittman, had enjoyed the privilege of competition with a poorly managed theatre. When this theatre was acquired by a competent operator, Pittman preferred to sell. The question of product or "buying power" had nothing to do with it.

In *Whitwell* v. *Continental Tobacco Co.* (C. C. A. 8, 1903) 125 Fed. 454, at page 462, the Court said:

> "It was not—it could not have been—the purpose or the effect of the second section of this law to prohibit or to punish the customary and universal attempts of all manufacturers, merchants, and traders engaged in interstate commerce to monopolize a fair share of it in the necessary conduct and desired enlargement of their trade, while their attempts leave their competitors free to make successful endeavors of the same kind. The acts of the defendants were of this nature, and they did not violate the second section of the law. An attempt to monopolize a part of interstate commerce, the necessary effect of which is to stifle or to directly and substantially restrict competition in commerce among the states, violates the second section of this act. But an attempt to monopolize a part of interstate commerce which promotes, or but indirectly or incidentally restricts, competition therein, while its main purpose and chief effect are to increase the trade and foster the business of those who make it, was not intended to be made, and was not made, illegal by the second section of the act upon consideration, because such attempts are indispensable to the existence of any competition in commerce among the states."

In *Goldman* v. *Hartford Building Asso.* (1926), 150 Md. 677, 133 Atl. 843, a demurrer was sustained to a bill of complaint alleging that plaintiff had applied to the defendant building association for a loan on certain property and that the defendant thereafter bought the same property which plaintiff had intended to buy. The Court said:

> "'Iron sharpeneth iron' is ancient wisdom, and the law is in accord in favoring free competition, since ordinarily it is essential to the general welfare of society, notwithstanding competition is not altruistic but is fundamentally the play of interest against interest and so involves the interference of the successful competitor with the interest of his unsuccessful competitor in the matter of their common rivalry. Competition is the state in which men live and is not a tort,

unless the nature of the method employed is not justified by public policy, and so supplies the condition to constitute a legal wrong. Disparity in knowledge, experience, skill, credit, wealth, or foresight of the competitors does not of itself furnish this additional condition, and make the competition unequal in a legal sense, since each competitor must necessarily bring to every competition his attributes, which may be a benefit or a detriment, but which are not an extraneous advantage as they simply constitute his subsisting equipment for the business of life. The law accepts this inherent disparity as being the basic condition of the individual in society and a quality entering into every treaty; and, by reason of its universality, the law does not treat the presence of the disparity mentioned as destroying the legal quality of the competitors."

In *Bell* v. *Etna Oil Service* (1932), 242 Ky. 471, 46 S. W. (2d) 757, it was held that plaintiff, who was engaged in the oil business, had no cause of action against competitors who consolidated and lured away plaintiff's employees and customers, cut prices, etc., with the alleged object and result of putting plaintiff out of business.

Other decisions of state courts to the same effect may be found. We have referred to them because the Sherman Act merely applies the common law to interstate commerce. The facts in these state cases, including the two cases specifically referred to above, went far beyond the allegations and facts in this case as to the aggressive methods of competition which were pursued. Applying these principles to the case at bar it is clear that the defendant exhibitors are merely accused of competing, in a normal way, with other exhibitors, and as a necessary part of this competition, of trying to license and exhibit the best pictures in order to attract the patronage of the public.

We next propose to demonstrate, by analysis of the divestiture provisions of the decree, that they not only have no tendency to remedy the alleged evils found by the District Court to exist, but are wholly illogical and have no other effect than to mete out haphazard punishment for the fail-

ure of defendant exhibitors to anticipate the novel application of the Sherman Act evolved by plaintiff's counsel and accepted by the District Court in this case.

2. Analysis of the divestiture provisions:

Crescent was not required to divest itself of its half interest in Strand Enterprises, a defendant exhibitor which was found not guilty of violating the Sherman Act. In holding Strand Enterprises not guilty the District Court referred to the facts: (1) that it was not a party to any franchise; (2) that when it bought out competitors it did not take from them agreements not to compete; and (3) that it did not collaborate with Crescent in making film deals.[7]

All three of these reasons, however, were equally applicable to Cumberland. It was undisputed that Cumberland was not a party to any of the franchises held to be illegal. If it was ever a party to a franchise, it was prior to the period covered by this suit. There was no evidence that Cumberland ever bought out a competitor and took an agreement not to compete. It was undisputed that Cumberland did its own film buying. Cumberland was found guilty only for the reason that it erected a modern theatre in Rogersville, Tennessee, where Miller was already operating an independent theatre in an old warehouse, without toilet facilities or a modern heating system; and that after Cumberland erected this theatre, it made film deals with one or more distributors who had previously made deals from time to time with Miller.

Crescent also was required to divest itself of its half interest in Lyric. The only reason Lyric was found guilty was that it had been a party to the franchise agreements held to be illegal. Lyric had never been the beneficiary of an alleged discrimination by a distributor against an independent. It is true, however, that there was collabora-

[7] R. 941, 1472-1473.

tion between Lyric and Crescent in making film deals, in that Messrs. Sudekum and Stengel negotiated film deals for Lyric as well as for Crescent.

Collaboration in making film deals could not, however be the basis of the divestiture provisions of the decree because the District Court expressly held that there was no illegality in a United Artists deal covering 73 different towns in which theatres were operated by twelve different exhibitor corporations (See Finding 165[8] and Conclusion 18).[9] Such a deal obviously saves selling expense which, if passed on in part to the exhibitors, should result in lower film rentals than if deals were made separately for each town or corporation. It may also be assumed that a distributor will be more inclined to say "take it or leave it" to a film buyer who is negotiating for only one theatre than to one who is negotiating for a substantial number of theatres.[10]

Lyric was not the only defendant exhibitor which was never the beneficiary of any alleged discrimination by a distributor against an independent competitor: neither was Kentucky, an affiliate of Rockwood. Nevertheless, Rockwood was required to divest itself of its half interest in Kentucky. Furthermore, Rockwood was required to divest itself of its half interest in Ruffin Amusements, although the latter was not even a defendant in the case and hence could not have been found guilty of any illegal act. Cherokee was likewise required to divest itself of its half interest in Newport, although the latter was not even a defendant in the case.

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[8] R. 1464-1466.

[9] R. 1478.

[10] A cooperative of theatre owners has been held not to be illegal *per se*, but to be illegal when its power was used illegally, viz. by overbuying for the purpose of preventing competitors from obtaining films, and by threatening with boycotts distributors who proposed to deal with competitors. *Midwest Theatres Co. v. Cooperative Theatres* (D. C. E. D. Mich. 1941) 43 F. Supp. 216, 222. In the case at bar there was not a scintilla of competent evidence, and no Finding by the District Court, that defendant exhibitors had been guilty of either practice.

In this connection it should also be pointed out that Rockwood was operating theatres in thirteen towns having an aggregate population of 31,193, and Cherokee was operating theatres in ten towns having an aggregate population of 22,049. That is to say, these two corporations together operated theatres in only twenty-three towns having an aggregate population of 83,242. Nevertheless, Rockwood is required to divest itself of its half interest in Cherokee. It is apparent that size alone could not logically be the basis of the divestiture provisions.

The foregoing analysis excludes the theory that the divestiture provisions were either logical or remedial. The only alternative theory is that they are punitive. The extent of the punishment can be measured only by examining the present tax laws. If and when the stocks in the subsidiary corporations are sold, the parent corporations must distribute the proceeds (after payment of the capital gains taxes) to their stockholders in the form of dividends. The stockholders must in turn pay the greater part of these sums to the Government in the form of income and surtaxes. Theoretically the parent corporations might retain the net proceeds of sale for reinvestment; but it would be absurd to require them to dispose of the theatre interests which they now own but permit them to acquire other theatre interests to replace them. It would serve no purpose for the parent corporations to retain these sums in the form of cash and pay the penalty taxes imposed by Section 102 of the Internal Revenue Code.

As to the Rockwood chain, the divestiture provisions of the decree are even more confiscatory. Rockwood itself is too small an enterprise to justify the entire time and efforts of the defendant, Stengel, or of any other competent executive with substantial earning power. The same thing is true of Cherokee. Actually paragraph (16) of the decree gives Stengel no real choice at all. He must stay with Crescent.

The divestiture provisions bear no relation whatever to the allegedly illegal acts found by the District Court to have

been committed, unless to weaken the bargaining power of the defendant exhibitors in their film negotiations with distributors and thereby tend to equalize their bargaining power with that of independent competitors.[11] If this is true, what will be the effect and result? The advantage of superior resources already possessed by the distributors will be enhanced. They will get higher film rentals which will absorb the profits of the exhibitors. "Once a theatre, always a theatre" is a motto in the industry, meaning that if an exhibitor goes broke, someone else will take over the theatre and the distributor will continue to have an outlet for its pictures. Possibly there will be a more rapid turnover in theatre ownership and management as the result of this decree, but the disadvantages to the public will greatly outweigh the advantages.

3. *Failure of the District Court to grant a trial period:*

At the hearing before the District Court on the form of the decree,—and there had been no prior hearing or argument as to the nature of the relief to be granted plaintiff in the event of a decision in plaintiff's favor,—it was contended by defendant exhibitors that the relief should be equitable and not punitive.

In this connection, there was urged upon the District Court the decision in *United States* v. *Great Lakes Towing Co.*, (1914), 217 Fed. 656, where the Court said:

> "The controlling inquiry thus is: What remedy promises the most effective measure of relief against the evils which we have found to exist?
>
> "In the instant case, the evil to be remedied is not the ownership by the towing company of the corporate stocks of the Dunham and the Union Companies, the Thompson Towing & Wrecking Association, the Hand & Johnson Tug Line, and the Great Lakes Towing Company, Limited. These companies were not sub-

[11] A comment by the District Judge during the course of the trial, R. 879, suggests that this thought influenced the decision. (See footnote, *supra*, p. 107). If so, a cooperative of theatre owners would be illegal *per se*.

stantial competitors. No good would result from distributing to the stockholders of the towing company the stocks of the five companies above enumerated; and the government does not so request. Nor does the evil reside in the mere ownership of the corporate stocks, or physical properties, or both, bought from the other corporations or individuals. It is concededly impossible to restore to the sellers the properties so bought. The combination represented by the towing company violates the Sherman Act because it is a monopoly created by abnormal and unfair means . . . Unless for such means, purposes, and practices, the size alone of the combination, or the mere unification of the towing interests thereby brought about, would surely not justify putting the towing company entirely out of business. . . .

". . . The towing company is before the court and subject to its injunctive processes, including punishment for disobedience thereto; and if we can impose upon that company prohibitions, susceptible of enforcement, which shall eliminate past abuses and remove obstacles to free competition, such course would provide the most effective relief available, and so would manifestly be for the public interest."

It was further urged that injunctive relief should at least be given a trial period before any order of divestiture, and there was urged upon the Court the decision in the case of *United States v. American Can Company* (1916), 234 Fed. 1019, where the Court said:

"In passing upon the government's contention, little will be added to that which has already been said. Jurisdiction of a court of equity is remedial, not punitive. A dissolution may not be decreed, unless there is reason to believe that more good than harm will come of it. . . . It is the duty of the courts to give effect to the legislative will, but it is equally their duty so to shape their decrees as to bring about the result desired by Congres with the least possible waste of anybody's time or of anybody's money . . .

"If, as has been suggested, jurisdiction over the case is retained, the assurance that the defendant will not

resort to unfair practices will be well-nigh absolute. Under such conditions it will not be likely to accept a competitor's offer to sell out to it, and thereby add to that size and power which, acquired as they were, in defiance of law, the court must necessarily view with suspicion and distrust. Under such circumstances the passing of a decree for dissolution seems both unnecessary and unwise. The insistence that the court has no choice in the matter assumes that equitable modes of relief are fixed and rigid. That is not so. The glory of chancery has always been that it could mold its remedies to meet the conditions with which it has to deal. In this case it appears probable that all potential restraints upon free competition now imposed by the size and power of defendant will pass away as speedily without as with dissolution, and that dissolution will cause far more loss and business disturbance than will attend the gradual re-establishment of competitive conditions by the play of economic forces. If so, no dissolution should now be decreed . . ."

In response to these suggestions as to the form of the decree, the comment of the Court was as follows: "You can just forget about the trial period under the injunction. I am not going to consider that at all. I am not going to have that matter before me. I am going to get rid of this lawsuit."[12]

We think the District Court did not give proper consideration to the nature of the relief granted. While we recognize the rule that such matters are usually within the discretion of the Trial Court, we respectfully submit that, in the case at bar, the Trial Court's discretion was arbitrarily exercised and that appellants are entitled to relief in this Court, all other questions aside.

This Court has always been careful to examine the relief granted the Government in equity cases under the Sherman Act and to make sure that the relief is no broader than necessary to eliminate the illegal activities. The Court

[12]R. 91.

has been particularly reluctant to order the breaking up of an existing business organization except in cases of the most compelling necessity. It was only because "effective relief" could be granted in no other way that the Court ordered dissolution in *Standard Oil Company* v. *U. S.* (1911), 221 U. S. 1, and in *United States* v. *American Tobacco Co.* (1911), 221 U. S. 106. Dissolution was not ordered in *Sugar Institute* v. *U. S.*, 297 U. S. 553, because the District Court felt that the objectives of the Sherman Act would be amply protected by the specific prohibitions of the decree. Jurisdiction was retained by the District Court for the purpose of "enforcing, enlarging or modifying" the terms of the decree.

In *U. S.* v. *Bausch & Lomb Optical Co.*, *supra*, the trial court had determined that Soft-Lite Lens Company and certain of its officers had violated the Sherman Act. The decree directed the cancellation of Soft-Lite's license agreements with retailers and its resale price maintenance contracts and agreements with wholesalers and prohibited the company from entering into any other agreement similar in effect or purpose to those adjudged unlawful. An exception was made in the case of so-called Fair Trade contracts; the decree permitted the company to renegotiate them after a period of six months. Jurisdiction was retained by the court for the entry of further orders or directions. The Government appealed seeking, among other things, a broadening of the decree by the substitution of a permanent instead of a six months injunction against new Fair Trade agreements and also the addition to the decree of a requirement that Soft-Lite sell its product without discrimination to any person offering to pay cash therefor. Both of these requests were denied by this Court, for reasons which are directly pertinent to this case.

With respect to the second suggestion, i.e., that Soft-Lite be required to sell its product to any person offering to pay

cash therefor, this Court referred to the decree actually entered and said:

> "... We have no reason to doubt that Soft-Lite will conform meticulously to the requirements of the decree. When it is shown to the trial court that it has not done so will be an appropriate time for the Government to urge this addition to the decree."

And, in denying the request that the six months prohibition be made permanent, the Court said:

> "What we have just said as to the Government's request for a requirement of sales by Soft-Lite to all applicants for its commodities is relevant to the Government's other request for modification of the decree to make permanent the six months' prohibition against Soft-Lite's systematically suggesting resale prices on its lenses and the execution of resale price maintenance contracts under the Miller-Tydings Act. The path is narrow between the permissible selection of customers under the decision in Colgate & Co. and unlawful arrangements as to prices under this decree, but we think Soft-Lite is entitled to traverse it, after a reasonable interim to dissipate unlawful advantages, with such aid as Congress has given by the Miller-Tydings Act. The suggestion for a permanent injunction is unacceptable."

The observations of the Court in the *Bausch & Lomb* case are directly applicable to the case at bar. The final decree in this case specifically prohibits the defendants from following certain practices determined by the trial court to be violative of the Sherman Act. Jurisdiction is retained for the purpose of entering such further orders or decrees as may be necessary for the construction, modification, termination or enforcement of the decree. As in the *Bausch & Lomb* case, there is no reason to doubt that the defendants will conform meticulously to the requirements of the decree. It must be remembered that the divestiture provisions of the decree do not purport to require the defendants to dis-

pose of specific theatres acquired as a result of allegedly unlawful practices. The requirement is that each of the corporate defendants divest itself of the ownership of any stock or other interest in any other corporate defendant, irrespective of whether the stock was acquired legitimately or otherwise. If the injunctive paragraphs of the decree directed to the *future* are observed, we can see no reason for this harsh punishment for the *past*.

The consent decree in the Paramount case is itself evidence of the unfairness of the divestiture provisions of the present decree. Paramount was said by plaintiff in that case to own 63 first-run metropolitan theatres and 1210 other theatres in 41 states; its gross assets were said to be approximately $90,000,00.[13] Fox was said to own 30 first-run metropolitan theatres and 508 other theatres in 17 states; its gross assets were said to be approximately $60,000,000.[14] Warner was said to own 35 first-run metropolitan theatres and 522 other theatres in 19 states; its gross assets were said to be approximately $150,000,000.[15] Loew's was said to own 24 first-run metropolitan theatres and 98 other theatres in 14 states; its gross assets were said to be approximately $150,000,000.[16] RKO was said to own 29 first-run metropolitan theatres and 103 other theatres in 10 states; its gross assets were said to be approximately $70,000,000.[17] Each of the five companies named was a producer, distributor and exhibitor of motion pictures.

It was stipulated[18] that the Court might take judicial notice of the allegations of the amended complaint in the Paramount case; and while the entire complaint is not copied in this record, it can be stated that every charge made against defendant exhibitors in this case was made

[13] R. 178-181.
[14] R. 183-186.
[15] R. 186-188.
[16] R. 181-183.
[17] R. 188-191.
[18] R. 1344.

against the defendants in that case, as well as many additional charges. Although the amended complaint asked for dissolution of the circuits and divestiture of their theatre holdings, the consent decree does not require any of them to divest themselves of their theatre holdings or break up their circuits.[19] In fact, Paragraph XI of the decree permits the defendants in that case to acquire additional theatres under certain limitations.[20]

The consent decree contains prohibitions against certain unfair trade practices and provides a method whereby complaints of certain types of unfair conduct on the part of the Big Five can be disposed of by arbitration. It was evidently the theory of the Government at the time the decree was entered that the correction of the alleged unfair trade practices made unnecessary and improper the much more drastic remedy of divestiture. Both consistency and elementary fairness require that the same treatment be accorded the defendants in this case. That is to say, the divestiture provisions of the decree should be eliminated, or at least they should be postponed for a trial period with leave to the Government to apply thereafter for the additional relief of divestiture if regarded as necessary to protect the public interest.

4. *Hardship of divestiture provisions on parties who were not defendants:*

It must be borne in mind that the stock ownerships of the defendant exhibitors among themselves and with respect to other corporations result merely in partnerships in the corporate form. For example, Crescent owns exactly 50 per cent of the stock in Lyric, and the other 50 per cent is owned by the Crute family who are residents of Huntsville, Alabama, where Lyric operates several theatres. Neither stockholder has control except by agreement with

[19] R. 198-227.

[20] R. 211-212.

the other. So long as the parties are in agreement, such a business enterprise will function smoothly as in the case of an ordinary partnership. On the other hand, if a stranger should acquire either stock interest without the approval of the other stockholder, a disastrous situation could easily come about.

It is apparent that the Crute family is thus vitally interested in the purchaser of the half interest in Lyric owned by Crescent. Of course, the record in this case does not indicate the ability or nonability of the Crute family to purchase the stock itself. It may be assumed, however, that for one reason or another they are unable to do so or unwilling to put all their eggs in one basket. For what reason should the Crute family be punished because Crescent has violated the Sherman Act, not with respect to the Huntsville theatres but in connection with Brownsville, Tennessee, or some other remote spot? The same situation exists with respect to Cumberland,[21] in which half the stock is owned by Crescent; Kentucky,[22] in which half the stock is owned by Rockwood; and Cherokee,[23] in which half the stock is owned by Rockwood.

The impropriety of the divestiture provisions is further illustrated by the fact that the decree requires Rockwood to sell its stock not only in Cherokee and Kentucky, but also its half interest in Ruffin Amusements, Inc., which was not made a defendant, and requires Cherokee to sell its half interest in Newport Amusements, Inc., which was not made a defendant. The authorities hereinbefore cited as to necessary and indispensable parties are applicable here. The rights of each of these corporations and its other shareholder would be directly affected by any change in its ownership or management.

[21]Cumberland operates thirteen theatres in ten small towns in Tennessee. R. 1360.

[22]Kentucky operates only in one Kentucky town, population 3,667. R. 1362.

[23]Cherokee operates fourteen theatres in ten small towns in Tennessee and North Carolina. R. 1362.

A case we regard as directly in point is *Minnesota* v. *Northern Securities Company*, (1902), 184 U. S. 199. In that case the State of Minnesota brought a bill in equity in this Court (under Sec. 2, Article 3, of the Constitution, giving the Supreme Court original jurisdiction of cases between a State and citizens of another State) seeking to prevent by injunction a combination between two competing railroad companies, the Great Northern and Northern Pacific Railway Companies. It was alleged that a majority of the stockholders of these two Minnesota corporations had turned their stock over to the defendant, Northern Securities Company, a New Jersey corporations, for the purpose of effecting joint control and management of the two railroad companies. The Great Northern and Northern Pacific Railway Companies were not made parties defendant and it would have ousted the jurisdiction of the Court if they had been made parties defendant. This Court said at page 235:

> "The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, so that there may be a complete decree, which shall bind them all. By this means the court is enabled to make a complete decree between the parties, to prevent future litigation, by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject matter, by a decree which might otherwise be granted upon a partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto. Story's Eq. Pldg. sec. 72."

After discussing the nature of the case, this Court said:

> "Can such a controversy be determined with due regard to the interests of all concerned, by a suit solely between the State of Minnesota and the Northern

Securities Company? It is, indeed, alleged that all of the stockholders of the Northern Securities Company are stockholders in the two railroad companies, and, therefore, it may be said that the latter stockholders are sufficiently represented in the litigation by the Northern Securities Company; but it is not alleged that the stockholders of the Northern Securities Company constitute or are composed of all the stockholders of the two railroad companies, and, in fact, the contrary is conceded in the allegations of the bill that a majority only of the stock of one, or perhaps both, of the two railroad companies is owned, or at least controlled and managed, by the Northern Securities Company. It is obvious, therefore, that the rights of the minority stockholders of the two railroad companies are not represented by the Northern Securities Company. They have a right to be represented, in the controversy, by the companies whose stock they hold, and their rights ought not to be affected without a hearing, even if it were conceded that a majority of the stock in such companies, held by a few persons, had assisted in forming some sort of an illegal arrangement."

This Court accordingly dismissed the case.

VII. FRANCHISES.

A. Assignment of Error 20.[1]

Paragraph (1) of the Final Decree is as follows:

"(1) That the defendants, The Crescent Amusement Company, a corporation, Muscle Shoals Theatres, a partnership, Rockwood Amusements, Inc., Cherokee Amusements, Inc., Lyric Amusement Company, Inc., and Kentucky Amusement Co., Inc., be, and they hereby are, enjoined and restrained from continuing in combination with each other and with each of the distributors, Paramount, Fox, and Warner, in making franchises with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them; and are further enjoined and restrained from entering into any similar

[1] R. 1518.

combinations and conspiracies having similar purposes and objects."

Findings 114-133,[2] inclusive, suggest that the repeat-run clauses and the clearance provisions in the three franchises were the features which, in the view of plaintiff's counsel and of the District Court, rendered the franchises illegal. There was no averment in the complaint that the franchises were illegal, but paragraph (10) of the decree invalidated each of them.

Clause 8-e of the Paramount franchise was one of the main points of controversy in the case. This clause was as follows:

> "The Exhibitor may at its election exhibit for repeat run exhibition any of the feature photoplays licensed hereunder at any theatre covered by this agreement upon the same terms and conditions applicable to the Hopalong Cassidy feature photoplays in respect of such theatre, as set forth in the annexed Schedule A, and the Exhibitor agrees to pay as license fees for each feature photoplay during each such repeat exhibition the license fees payable hereunder for the said Hopalong Cassidy feature photoplays."

Where an exhibitor has licensed a season's product at specified film rentals, it will frequently develop that one or more feature pictures prove to be "hits", and the public demands a second exhibition of the picture. Sometimes because of bad weather, some other attraction in town, or for some other reason, there are many persons who fail to see a good picture. It is to the advantage of both the exhibitor and the theatre-going public that such pictures be repeated. If there is no repeat-run clause in the contract, it becomes necessary for the exhibitor and the distributor to negotiate for the film rentals to be paid when these pictures are re-

[2] R. 1430-1457.

peated.[3] A repeat-run clause precludes the necessity for such negotiations.[4] There is not the slightest evidence that the parties to the Paramount franchise had any other purpose in mind by including Clause 8(e) in the franchise.

The District Court regarded this repeat-run clause as amounting to a contractual obligation on the part of the distributor not to license second-run product to a competing exhibitor. This was a fundamental error in the District Court's treatment of the franchises. Even without such a clause it was not the usual policy of distributors to license pictures for second-run exhibition in small towns by a competitor of the first-run theatre (e.g. Fox at Gallatin, Tennessee).[5] Even in larger towns, it would not be to the advantage of a distributor to license pictures for second-run exhibition by a competitor of the first run house unless the exhibitor contracts for a full second-run deal.[6]

It is particularly to the disadvantage of the distributor to license second-run product to a competitor of the first-run house where the film rentals paid by the first-run house for the top feature pictures are based on a percentage of gross receipts. The Paramount franchise provided that the film rentals for the four top features for each season would be 40 per cent of the gross receipts. If the public knows in advance that particular pictures will be played in the second-run house at lower admission prices, the gross receipts of the first-run house will necessarily be impaired and there is a probability that the total revenue of the distributor in the town will likewise be impaired.

The trouble with Clause 8(e) as originally drafted was that it required Paramount to keep prints available for an indefinite length of time. When Smith's complaint to the Department of Justice was brought before the Paramount officials, the inadequacy of Clause 8(e) was brought to

[3] R. 1039.
[4] R. 1212-1213.
[5] R. 847.
[6] R. 1325-1326.

light and prompt steps were made to clarify the situation by requiring the parties to the franchise to decide within thirty days after playing a particular picture whether they wanted to repeat it.[7] The omission of such a provision in Clause 8(e) as originally drafted was simply the result of poor draftsmanship, however, and not for any unlawful purpose as insisted by plaintiff.

The repeat-run clause in the 1939 Fox franchise (see Finding 130) expressly provided that where Fox made a second-run deal with an independent exhibitor in a competitive situation, the repeat-run privilege in that town would be automatically eliminated. The Department of Justice attitude toward repeat-run clauses had evidently come to the attention of an exhibitor who had threatened Fox with a lawsuit, and the Fox lawyers had advised against repeat-run clauses similar to the one in the Paramount-Crescent franchise. The repeat-run clause in the Fox franchise was so worded as to avoid legal difficulties.[8] There can be no possible argument that the Fox repeat-run clause discriminated against independent exhibitors. Nevertheless, the Fox three-year franchise was invalidated along with the Paramount five-year franchise and the Warner three and one-half year franchise.

The repeat-run clause in the three franchises will be further discussed in connection with Assignments of Error 12 to 15 inclusive, relating to Findings of the District Court in which these franchises were referred to. A purely academic question is involved. The distributors had, over a period of years, developed their own policies in regard to second-run deals, and they simply followed these established policies.

As to the clearance provisions, it has been uniformly held, in the treble damage cases which have came before the lower courts since the Anti-Trust Division took an interest in the motion picture industry, that reasonable clear-

[7] R. 689, 697-698, 1035, Exhibit P-31.

[8] R. 1213-1216.

ance provisions in licensing agreements are not invalid.[9] On the contrary, such provisions are normal and indeed necessary, being for the benefit of both the distributors and the exhibitors. Of course a clearance provision may be unreasonable, under the circumstances of a particular case. In the case at bar, however, there was no issue as to the reasonableness or unreasonableness of any particular clearance provision. Apparently the Government's contention was that clearance should be renegotiated at short intervals because conditions may change and a clearance provision, reasonable when negotiated, may become unreasonable when conditions change. There was no contention, however, that any particular clearance provision had become unreasonable, and the argument is purely theoretical.

In the argument on the form of the decree, counsel for defendant exhibitors suggested that paragraph (1) of the decree be drafted in such a way as to indicate that defendant exhibitors might safely make franchises in which the repeat-run clause followed the repeat-run clause in the Fox franchise and in which clearance provisions were not frozen for the entire period of the franchise. On this point the Court said:

> "THE COURT: All I can say is that you can't make any more franchises like those you have made. I am not ruling in advance on what some other franchise might be or might not be."[10]

Counsel for defendant exhibitors also suggested that the decree make it plain that a film deal covering two seasons' product is not invalid. On this point the Court said:

> "THE COURT: I haven't decided in this case that a two years franchise is invalid."[11]

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[9] *Westway Theatre* v. *Twentieth Century Fox Film Corp.*, (D. Md. 1940) 30 F. Supp. 830; aff'd. (C. C. A. 4, 1940), 113 F. (2d) 932. *Gary Theatre Co.* v. *Columbia Pictures Corp.* (C. C. A. 7, 1941), 120 F. (2d) 891.

[10] R. 47.

[11] R. 52.

We think that if appellants are to be enjoined from making franchises "with the intent and purpose" of violating the Sherman Act, they are entitled to provisions in the injunctive portion of the decree which will furnish them some ascertainable standard of conduct.[12] In other words, if the repeat-run clauses in the Paramount and Warner franchises are in restraint of trade, or if the clearance provisions of any of the franchises are in restraint of trade, and if a franchise is otherwise illegal only if it covers more than two seasons' product, the injunction should be so worded as to make it clear that a two-year franchise without the objectionable features is valid.

Certainly these franchises would not have been considered contracts in restraint of trade at common law; and if that is true, they are not within the purview of the Sherman Act as interpreted by this Court in *Apex Hosiery Co. v. Leader, supra.* It should be borne in mind that this suit was instituted in 1939 prior to the *Apex Hosiery Company* decision in which the legislative history and meaning of the Sherman Act were fully expounded. Unfortunately, the Government has not been willing to accept the interpretation there announced.

As late as September 16, 1943, the District Court for the Southern District of New York was called upon to decide a contention of the Anti-Trust Division that certain contracts made by the Western Union Telegraph Company constituted unreasonable restraints of trade and commerce in telegraph communication, in violation of the Sherman Act. These contracts were entered into between the telegraph company and various railroad, transportation and terminal companies, hotels, public buildings, etc., granting rights of exclusive occupancy to the telegraph company for stated

[12] *United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707, decided April 10, 1944.

periods of time. District Judge Nevin (sitting by designation) said:[13]

> "The elements which make contracts, otherwise lawful, sometimes illegal as being in restraint of trade as set forth in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, are not present. The Court has not been unmindful of the distinction existing between enterprises inherently public in their character and those of a private nature, as pointed out in the *Trans-Missouri Freight* case, 166 U. S. 290, nor of the further fact that telegraph companies are to be deemed public service corporations, affected by a public interest. *Central N. Y. Telephone and Telegraph Co.* v. *Averill*, 199 N. Y. 128."

The contracts considered in the above case were exclusive contracts. The franchises in the case at bar were *not* exclusive contracts except in the sense that the distributors could not license the same picture for *first run* exhibition to more than one exhibitor in the same town. In the case above mentioned the telegraph company conducted a business affected by a public interest. The motion picture industry, on the other hand, is not of that character.

We think any injunction against the making of franchises is outside the scope of the pleadings in the case at bar.[14] If incorrect in this position, however, it is respectfully submitted that a licensing agreement covering a copyrighted product or patented product is not in violation of the Sherman Act merely because it runs for two, three or five years or for a longer period. (The plaintiff did not so contend during the trial).[15] There are ups and downs in the business world,—"buyers' markets" are followed by "sellers' mar-

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[13] *United States* v. *Western Union Telegraph Co. et al*, Equity No. 86-129, reported in Commerce Clearing House Trade Regulation Service, Par. 52, 980, p. 53, 611.

[14] See R. 10-12 as to relief prayed in the complaint. While paragraph 2 is couched in broad language, attention is called to the fact that the body of the complaint makes no distinction between franchises and short term-deals.

[15] R. 782.

kets",—and both exhibitors and distributors should have the privilege of making long-term arrangements to afford them some measure of protection from the changes in the business cycle.[16] A long-term lease of real estate is in the same category. How can it possibly be said to be illegal for an exhibitor to make franchise agreements with only three of the eight distributors mentioned in the complaint,—the product of the remaining five distributors, as well as independents, being available for its competitors?[17]

B. Assignments of Error 12 to 15 Inclusive.

These assignments of error relate to the Findings in connection with the three franchises. The principal purpose of these assignments is to illustrate and high-light the prejudicial effect, with respect to this issue, of the consideration by the District Court of incompetent evidence and of the adoption from the Government's brief of the Findings on which the Government now relies in defending paragraph (1) of the decree. The quotations made from the

[16] In a rising market, the distributors are likely to discourage the making of franchises as not to their advantage. See R. 1333, 1339. They can protect themselves, however, by provisions stepping up the film rentals each year, as in the case of the five year Paramount franchise.

[17] In paragraphs 40-42, of the complaint, R. 7, the position is taken that it is necessary for an exhibitor to have the first-run product of three or more of the eight distributors in order successfully to opeate a first-run theatre and that it is necessary to have the second-run product of three or more of the eight distributors in order successfully to operate a second-run theatre, etc. We have heretofore pointed out that in the case at bar there was no evidence that any independent exhibitor did not have sufficient product according to the test announced by plaintiff. In *William Goldman Theatres, Inc.* v. *Loew's, Inc. et al* (D. C. E. D. Pa. 1944), 54 F. Supp. 1011, the District Court dismissed a civil action for injunctive relief and damages, based upon an alleged conspiracy to monopolize the motion picture business in Philadelphia, where the evidence showed that none of the eight distributors would license pictures to plaintiff for first-run exhibition.

Findings are, in each instance, the language of plaintiff's counsel as found in plaintiff's brief.

Finding 118—Paramount Franchise. (Assignment of Error 12).[1]

In this Finding, after referring to the clearance provision in the franchise, it is said:

> "The effect of the franchise (Ex. P. 21, P. 29 and P. 30), on the independent competition at Dresden, Earlington, Gallatin, McKenzie, Spruce Pine, Union City, Hopkinsville, Gadsden, Morristown, Harriman, Newport and Mt. Pleasant has already been recounted. Morgan, in negotiating it, knew precisely what its effect on these independent accounts would be."[2]

This language is a mere argument. When the Findings[3] in reference to the situations referred to are examined in connection with the comments hereinbefore made in this brief in regard to some of them, the impropriety of this language in Finding 118 will be apparent. As to Spruce Pine, attention is called to the fact that original Finding 61 was later modified.[4] As to Dresden and Newport, attention is called to the fact that the "circuit" competition was by corporations which were not made defendants in the case.[5] As to Gallatin and Mt. Pleasant, attention is called to the fact that although plaintiff was required by the Court to specify in bills of particulars the competitors of defendants

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[1] R. 1511.

[2] R. 1435.

[3] Findings not made the subject of assignments of error are as to Dresden, R. 1418-1419; Gallatin, R. 1412-1413; Spruce Pine, R. 1391, 1490; Harriman and Newport, R. 1395-1397; and Mt. Pleasant, R. 1419.

[4] R. 1490.

[5] Ruffin Amusements, Inc. operated the theatres at Martin and Greenfield (R. 1362) referred to in Findings 90 and 91 (R. 1418-1419); and Newport Amusements, Inc. operated the theatre at Newport referred to in Findings 69 and 70 (R. 1396-1397).

whose competition was "restrained", etc., as alleged in paragraph 49 of the complaint, neither Gallatin nor Mt. Pleasant was specified in item 6 of any of the four bills of particulars.[6]

Finding 119—Paramount Franchise.

(Assignment of Error 13):[7]

The following language appears in Finding 119:[8]

> "The repeat-run clause in the franchise was completely effective in preventing the sale of a second-run of any Paramount features to an opposition theatre, as shown by the experience of Smith, Anderson and Henry when they tried to buy a second-run. As Morgan described its effect in a letter to Unger, his immediate superior, on November 14, 1939 (Ex. 152):
>
> > 'In any event, the only way we could sell second-run, even if we wanted to in these particular towns (Harriman, Morristown and Newport) would be after Sudekum had taken the refusal, because Paragraph E of Article 8 of the Crescent Amusement Company franchise provides he can repeat any feature at a given price.' "

Smith (Morristown) and Anderson (Hopkinsville) have heretofore been discussed.[9] Finding 81 as to Henry (Union City) made no reference to the repeat run clause; and pursuant to its general policy, Paramount would not have made a second-run deal with Henry instead of Crescent, its first-run account in that town, even in the absence of a repeat-run clause in the franchise.

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[6] R. 144, 152, 153-173.

[7] R. 1512.

[8] R. 1435.

[9] Assignments of Error 9 and 8 respectively, *supra*, pp. 89-92.

[10] R. 1040, 1326.

Finding 119 then proceeds:

> "The repeat-run clause was apparently never brought to the attention of Agnew, the general sales manager, until this trial, and even after Unger suggested a modification, the only thing that was done was to make Crescent and Rockwood exercise the option within a fixed period of time. The clause, as modified, still prevents the sale of a second run to the opposition."

We think the last sentence is misleading. Certainly Paramount did not relinquish its legal right to make a second-run deal with the opposition. It may be said that pictures actually repeated by Crescent or Rockwood might then be played third-run, rather than second run, by the competing theatre, if Paramount decided to give Crescent or Rockwood the earlier play-date. Assuming that to be true, we fail to see any impropriety in such an arrangement. *The situation never actually arose, however, and hence there is no basis for a contention that there was any restraint of trade of trade or commerce.*

Finding 122—Warner Franchise. (Assignment of Error 14).[1]

The repeat-run clause in the Warner franchise permitted the exhibitor to repeat a picture, at the lowest allocated rentals, *in lieu of* a picture which would otherwise have been played pursuant to the contract. The public thus benefitted. This clause was applicable only to towns where there was no second run commitment or where there was originally a second-run commitment but the defendant exhibitor closed the second-run theatre. The Warner franchise provided for the playing by Crescent of 24 pictures on percentage, so there was very little liklihood that Warner would desire to license its product for second-run exhibition by a competitor of the defendant exhibitor.

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[1] R. 1512.

Finding 122[2] includes the following:

"But even with one theatre closed and its second-run commitment out of the way, the exhibitors obviously wished to still be in a position to prevent a competitor from getting a second run. The last paragraph, giving a repeat-run option where one theatre is closed, was plainly an addition to the rider insisted upon by exhibitors, as it confers no rights or advantages on the distributor. Unlike the Paramount repeat-run clause, this option was so worded as to make the repeat-run subject to such other runs in the same town as the distributor might license. The only purpose that this clause could serve was to make it difficult for Warner to license a second-run theatre in opposition to Crescent after Crescent shut one theatre and got rid of its second-run commitment.

"The purpose of the repeat-run option was plainly to replace the second-run commitment as a means of tying up second run in the situations where that commitment was subject to elimination upon closing a theatre, as in the situations where no second-run commitment was made, a straight repeat-run privilege was inserted which does not depend on the closing of a theatre to take effect. Thus is Harriman and Morristown, where Crescent was also operating two theatres, but no second-run commitment was made, the repeat-run clause reads as follows:

> 'KCS. Exhibitor shall have the right to repeat any feature at the lowest allocated rentals subject to all runs and clearance which may now exist or may hereafter be granted to other exhibitors in Harriman, Tennessee, and in such event the exhibitors commitment to exhibit such features in the lowest rental classification shall be reduced accordingly.'

"The only difference between this and the repeat-run clause previously quoted is in the stricken opening phrase: 'In the event one theatre closes'. In all of the one-theatre situations in which no second run was

[2] R. 1440-1443.

bought, the same unqualified repeat-run clause as that stated above was used."

The statement as to the "purpose" of the repeat-run clause is a wholly unwarranted argument of plaintiff's counsel, adopted by the District Court as a finding of fact. The repeat-run clause permitted the exhibitor to repeat a picture which turned out to be a better attraction than previously expected, but without the necessity of negotiating all over again as to the film rentals. It was to the advantage of the public for good pictures to be repeated in lieu of inferior pictures which would otherwise have been played. There is no Finding, and there was no contention by plaintiff, that the repeat-run clause in the Warner franchise ever prevented any independent exhibitor from getting pictures or that Warner was contractually obligated not to license its product for second-run exhibition by an independent exhibitor.[3] The provision making the privilege of repeating a picture "subject to such other runs in the same town as the distributor might license" eliminated the principal ground of the objection made by plaintiff to the repeat-run in the Paramount franchise.

Finding 127—Fox Franchise.

(Assignment of Error 15).[1]

Plaintiff introduced in evidence as Exhibit 205[2] a letter dated March 13, 1936 from the Atlanta District Manager of Fox to the New York Sales Manager of that Company which included the following:

> "As you know we have had a great deal of difficulty with the Sudekum Circuit and the procedure in the past has been such that we almost had to take anything that Sudekum wanted to give us. I have been on the verge of splitting with him a time or two, but could not see

[3] R. 1091.
[1] R. 1513.
[2] R. 826-828.

that I was gaining anything, so always late in the season would take rather unsatisfactory deals.

"However, this year, after repeated efforts to get together with him on any kind of a deal that would show an improvement over anything we received in the past, I closed up and called it a day and attempted to salvage what money I could from a few opposition points, thinking that maybe with Fox out some opposition would open up. He has opposition in the towns of Gadsden and Maryville in the Atlanta territory and in the Memphis territory he has opposition in Paris, Tennessee. In the Indiana territory, they sell a little bit of a town outside of Madisonville, called Earlington, which George Landis advised me he received a very satisfactory contract from for the K-3 product. In Decatur he has opposition in a town called Hartselle, which we have sold, but this is all we could salvage; I imagine the whole thing amounted to about seven or eight thousand dollars.

"Since I have sold away from Tony, he has evidenced some desire to get together with us in the future and while it is too late to sell him in some of his spots this year, we have worked out a deal that I think is excellent. I am sending you a recap of the money that we have received, which includes all of the towns in his circuit, for which he buys direct, (he still owns half interest in the Hill Circuit, but this is a separate corporation). This shows the gross total of $24,745.50.

"Briefly, the deal is this:—he is to give us $20,000.00 for half of the K-3 product, but deducting from this the money that he would normally allocate against the towns where we have already sold. In other words, we only sell him half of the K-3 product, but in view of the fact that we receive more from these towns than we have received from Tony, the deal will probably run up to considerably more than $20,000.00 for the K-3 product.

* * *

"I would appreciate your giving me your thoughts in the matter, or anything else you might want to add to this, but I would like to get it operating as quickly as possible. These are all very small towns, no opposi-

> tion and some of them are pretty bad looking propositions insofar as gross returns are concerned, although a few of them are pretty good. I do not think I could ever do any better and I am quite sure that I could not go up there 'cold' and sell him next year's product at $40,000.00."

Mr. Ballance, the author of this letter, was introduced as a witness and testified that he wrote it.[3] He was not asked to explain it in any way or to verify any statements or facts contained in the letter. Clearly the letter is not a proper basis for a Finding that any independent exhibitor paid higher film rentals than Crescent in any individual situation. Nevertheless the letter is made the basis of the following language in Finding 127:[4]

> "Even though the independents in the towns where there was then opposition, Earlington, Gadsden, Maryville, Paris and Hartselle, paid Fox more than it received from Sudekum, the total revenue from them added up to only 'about seven or eight thousand dollars'. The Sudekum franchise offered a total rental of better than $120,000.00 for all situations for the three years' product and that being the case, this product was sold away from the independent exhibitors at the 'opposition points', who had bought the 1935-36 product, without giving them any opportunity to negotiate for the next season. Everyone of these independents, who paid more than Sudekum in their individual situations but could not collectively match his total Circuit purchase, was eventually taken over by Crescent or Rockwood before the expiration of the francise in August, 1939."

This is another illustration of the way in which incompetent evidence is made the basis of the Findings of the District Court.

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[3] R. 824.

[4] R. 1450.

Finding 127 also contains the following statement:

> "Hendren's letter of February 7, 1936 (Ex. 258), indicates that if he could have gotten the Fox 1936-37 product he would have discontinued negotiations with Sudekum for the sale of Maryville and Greeneville. For the 1935-36 feature product in Maryville, he paid $2,456.61 as against $570.00 paid by Crescent for the 1934-35 feature product and $1,080.00 paid by Crescent for the 1936-37 feature product (Ex. 327) in the same town. For the 1935-36 feature product in Greeneville he paid $2,589.00 against $1,095.00 paid by Crescent for 1937-38 (Ex. 328)."

In order to avoid repetition, reference is made to the discussion in an earlier portion of this brief as to the foregoing language in the Court's Finding.[5] Hendren's actual testimony, on direct examination by plaintiff's counsel, was that the question of product had nothing to do with the deal between Parrott & Hendren and Crescent.[6] As previously demonstrated, Parrott & Hendren had Fox product continuously in Greeneville.[7] There was no evidence to the contrary.

Finding 133—Fox, Warner and Paramount Franchises. (Assignment of Error 15).[1]

Finding 133[2] contains the following language:

> "One obvious purpose of all three franchises was to give Fox, Warner, and Paramount an ostensibly valid legal excuse for discriminating in favor of the Sudekum circuit in licensing its films during the period covered in the same manner that they had discriminated in the past. The Sudekum circuit, by virtue of having built up a preponderance of closed situations, through the

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[5] *Supra*, pp. 60-61.
[6] R. 240.
[7] R. 847.
[1] R. 1514.
[2] R. 1456.

persistent elimination of competition, was in a position to deal effectively with such competition as remained or might arise in the future, in making one-year film deals, but franchises offered protection against future changes in those discriminatory practices."

The statement as to "one obvious purpose" of the three franchises is another wholly unwarranted argument of counsel, adopted by the District Court as a finding of fact. Executives of the three distributors testified that the initiative for making these franchise came from the distributors themselves and not from the defendant exhibitors.[3] Their reasons were to insure a continuous outlet for their pictures. There is not the slightest evidence in the record of any unlawful purpose on the part of either the defendant exhibitors or the distributors in the making of these franchises.[4]

CONCLUSION.

In conclusion, it is respectfully submitted that all of the assignments of error made by the defendant exhibitors should be sustained and that this case should be reversed and dismissed. At the very least, it should be remanded to the District Court with directions to eliminate paragraphs (1), (8), (12), (13), (15), (16) and (18) of the decree and to revise paragraph (21) of the decree relating to costs, so as to relieve appellants of that burden.

Respectfully submitted,

GEORGE H. ARMISTEAD, JR.,
WILLIAM WALLER,
Attorneys for Crescent Amusement Company et al.

ARMISTEAD, WALLER, DAVIS & LANSDEN,
Of Counsel

Nashville, Tennessee.

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[3] R. 1083, 1121, 1323, 1339.

[4] See R. 1216 as to reasons defendant exhibitors wanted franchises.

APPENDIX.

IN THE DISTRICT COURT OF THE UNITED STATES
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action 54

UNITED STATES OF AMERICA, *Plaintiff*

vs.

CRESCENT AMUSEMENT COMPANY, INCORPORATED, ET AL., *Defendant.*

FINAL DECREE.

This cause having come on for hearing before this Court upon the pleadings and upon the testimony, both oral and documentary, introduced at the trial of this cause, and the same having been argued by counsel both orally and upon briefs submitted, and the Court having made and filed its findings of fact and conclusions of law herein on the 3rd day of March, 1943:

It is hereby ordered, adjudged and decreed as follows:

(1) That the defendants, The Crescent Amusement Company, a corporation, Muscle Shoals Theatres, a partnership, Rockwood Amusements, Inc., Cherokee Amusements, Inc., Lyric Amusement Company, Inc., and Kentucky Amusement Company, Inc., be, and they hereby are, enjoined and restrained from continuing in combination with each other and with each other of the distributors, Paramount, Fox and Warner, in making franchises with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them; and are further enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects.

(2) That the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, a corporation, Cherokee Amusements, Inc., Anthony Sudekum, Kermit C. Stengel, and Louis Rosenbaum, be, and they hereby are, en-

joined and restrained from continuing in combination with each other for the purpose of dividing the territory in which theatres may be operated by any of them pursuant to implied agreements among themselves; and are further enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects.

(3) That the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, a corporation, Cherokee Amusements, Inc., Anthony Sudekum, Kermit C. Stengel, and Louis Rosenbaum, be, and they are hereby enjoined and restrained from continuing in combination with each other for the purpose and with the effect of eliminating, suppressing and preventing independent competition in the territory in which each operates; and are further enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects.

(4) That the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, a corporation, Cherokee Amusements, Inc., Anthony Sudekum, Kermit C. Stengel and Louis Rosenbaum be, and they hereby are, enjoined and restrained from continuing in combination with each other, and with Paramount, Fox, Warner, Loew's, RKO, and United Artists in licensing films for the purpose and with the effect of maintaining their theatre monopolies and preventing independent theatres from competing with them; and are further enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects.

(5) That the defendant United Artists Corporation, be, and it hereby is, enjoined and restrained from continuing in combination with Cumberland, Rockwood, and Stengel to eliminate its independent theatre competition at Rogersville, Tennessee; and is further enjoined and restrained from entering into any similar combinations having similar purposes and objects.

(6) That the defendant United Artists Corporation be, and it hereby is, enjoined and restrained from continuing in combination with Rosenbaum, Sudekum, Rockwood and

Steagel to eliminate independent theatre competition of Muscle Shoals at Athens, Alabama; and is further enjoined and restrained from entering into any similar combinations having similar purposes and objects.

(7) That each of the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, and Cherokee Amusements, Inc., be and it hereby is, enjoined and restrained from creating or maintaining an unreasonable monopoly of the business of operating theatres in the towns of Tennessee, Northern Alabama, and Central and Western Kentucky, in which each has theatres.

(8) That each of the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company and Cherokee Amusements, Inc., be and it hereby is, enjoined and restrained from combining its closed towns with its competitive situations, in licensing films for the purpose and with the effect of compelling the major distributors to license films on a non-competitive basis in competitive situations and to discriminate against its independent competitors in licensing films.

(9) That each of the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, and Cherokee Amusements, Inc., its officers, agents or servants, be and it hereby is enjoined and restrained from coercing or attempting to coerce independent operators into selling out to it, or to abandon plans to compete with it by predatory practices.

(10) That all existing franchises to which the Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, Cherokee Amusements, Inc., Lyric Amusement Company, Inc., Kentucky Amusement Company, Inc., Anthony Sudekum, Kermit C. Stengel, or Louis Rosenbaum, hereinafter referred to as the exhibitor defendants, is a party be, and they hereby are, declared invalid, except insofar as any such franchise may relate to theatres operated by any of said defendants in Nashville, Tennessee, the validity of which the Court does not expressly adjudicate in this cause.

(11) That all existing agreements not to compete in the future to which any exhibitor defendant is a party, be, and they hereby are, declared invalid:

(12) That each exhibitor defendant be, and hereby is, enjoined and restrained from conditioning the licensing of films in any competitive situation outside Nashville, Tennessee, upon the licensing of films in any other theatre situation.

(13) That each of the corporate exhibitor defendants, be, and it hereby is, required to divest itself of the ownership of any stock or other interest in any other corporate defendant, or affiliated corporation, with the exception of Strand Enterprises, Inc., and each such defendant is hereby enjoined and restrained from acquiring the ownership of any stock or other interest in any other corporate defendant, or affiliated corporation, with the exception of Strand Enterprises, Inc.

(14) That the defendant, Louis Rosenbaum, be, and he hereby is, required to divest himself of any interest which he may have in any of the corporate defendants, and said defendant Rosenbaum is hereby enjoined and restrained from acquiring any interest in said corporate defendants.

(15) That the defendant, Anthony Sudekum, be and he hereby is, required to resign as an officer of any corporation except the Crescent Amusement Company, which is affiliated with any exhibitor defendant, and said defendant is enjoined and restrained from acquiring any control over any such affiliated corporation, except the Crescent Amusement Company, by acting as an officer thereof, or otherwise.

(16) That the defendant, Kermit C. Stengel, be, and he hereby is, required to resign as an officer of any corporation, except one defendant corporation of his choice, which is affiliated with any exhibitor defendant, and said defendant is enjoined and restrained from acquiring any control over any such affiliated corporation, except the corporation of his choice, by acting as an officer thereof, or otherwise.

(17) Wherever reference is made in this decree to affiliated corporations such reference shall not include the following corporations: Bijou-Louisiana Corporation, Shreveport Theatre Corporation, Bijou-Pensacola Cor-

poration, Bijou-Ft. Worth Corporation, Ace Theatre Corporation, Lincoln Amusement Company, Lewisburg Theatre Company, the Auditorium Company, Hippodrome Attractions, Stock Yards, Ricks Hosiery Mills, Springfield Woolen Mills, Mid-State, Chickasaw, Dickson and Nu-Strand Corporation.

(18) That the acts of dissolution described in paragraphs (13), (14), (15), and (16) hereof, shall be performed within one year from date of entry of this decree.

(19) That the exhibitor defendants, and each of them be, and they hereby are, enjoined and restrained from acquiring a financial interest in any additional theatres, outside Nashville, Tennessee, in any town where there is already located a theatre, whether in operation or not, unless the owner of such theatre should voluntarily offer to sell same to either of the exhibitor defendants, and when none of said defendants, their officers, agents or servants are guilty of any of the acts or practices prohibited by paragraph nine (9) hereof.

(20) That the jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to apply to the Court at any time for such further orders and decrees as may be necessary or appropriate for the construction or carrying out of this decree, for modification or termination of any of the provisions thereof, for the enforcement or compliance therewith and for the punishment of violations thereof.

(21) That the costs of this action shall be taxed against the exhibitor defendants.

(22) That the Bill of Complaint be, and it hereby is, dismissed as to the defendants, Strand Enterprises, Inc., Universal Pictures Company, Inc., Universal Film Exchanges, Inc., Columbia Pictures Corporation, and R. E. Baulch, upon the merits.

Enter May 17, 1943.

ELMER D. DAVIES,
United States District Judge.